IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 687

JOHN H. FAHEY AND A. V. AMMANN, INDIVIDUALLY AND RESPECTIVELY AS FEDERAL HOME LOAN BANK COMMISSIONER AND CONSERVATOR FOR THE LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION,

Appellants.

vs.

PAUL MALONEY, C. H. NEWHOUSE, WINNIE BUCKLIN, *et al.*

Upon Appeal from the District Court of the United States for the Southern District of California.

BRIEF OF APPELLEE, TITLE SERVICE COMPANY.

HARRY C. WALLACE

SUBJECT INDEX

PAGE

Introduction 1

Factual background 2

I.

Absolute jurisdiction of trial court 14

II.

Fahey not indispensable party 19

III.

Interpleader confers complete jurisdiction 21

IV.

Duty of trustee to protect titles 32

V.

Court has jurisdiction 32

VI.

Pleadings filed by this appellee raised issues of unconstitutionality 33

Flaunting judicial authority 36

VII.

Section 5(d) of the Home Owners' Loan Act of 1933, as amended, is unconstitutional 37

VIII.

Position of Title Service Company. How affected by judgment 60

IX.

The court properly made a final decree and granted a preliminary and permanent injunction 62

X.

The provisions of the Home Owners' Loan Act are separable 67

XI.

Reply to appellants' opening brief 68

PAGE

A.

Appellants' Point I(A) 70

B.

Appellants' Point I(B) 76

C.

Appellants' Point I(C) 77

D.

Appellants' Point II 79

E.

Appellants' Point IV 81

F.

Effect of dismissal: 88

Conclusion 89

TABLE OF AUTHORITIES CITED

CASES	PAGE
A. L. A. Schechter Poultry Corp. v. United States, 295 U. S. 495	38, 52, 55, 56, 64
All Continent Corp. v. Steelman, 86 F. (2d) 913; reversed 301 U. S. 278	16
Allegheny Oil Co. v. Snyder et al., 106 Fed. 764; cert. den. 181 U. S. 618	66
American Power and Light Company v. Securities and Exchange Commission and companion cases, 325 U. S. 846, 91 L. Ed. Adv. Ops. 89	73
American School of Magnetic Healing v. McAnnulty, 187 U. S. 94	21
Bede Steam Shipping Co. v. New York Trust Co., et al., 54 F. (2d) 658	15
Butler v. United States, 297 U. S. 1	39, 44
Carter v. Carter Coal Co., 298 U. S. 238	39, 44
Clarke v. Boysen, 39 F. (2d) 800; cert. den. 282 U. S. 869	17
Coca-Cola Co. v. Los Angeles Brewing Co., 1 F. R. D. 67	63
Coe v. Armour Fertilizer Works, 237 U. S. 413	39, 46
Colorado v. Toll, 268 U. S. 228	19, 79
Dick v. Foracker, 155 U. S. 404	17
Esquire, Inc. v. Walker (Postmaster General), 55 Fed. Supp. 1015	21
Fischer v. American Life Ins. Co., 314 U. S. 549	16
Goldsmith v. U. S. Board of Tax Appeals, 270 U. S. 117	72
Hampton v. United States, 276 U. S. 394	55
Harris v. Traveler's Insurance Co., 40 F. Supp. 154	30
Hopkins Savings Association v. Cleary, 296 U. S. 315	67, 76
Hunter v. Federal Life Ins. Co., 111 F. (2d) 551	29, 84
Jarvis (Postmaster) v. Schachelton Inhaler Co., 132 F. (2d) 110	20, 79

PAGE

Kelleam v. Maryland Casualty Co., 112 F. (2d) 940 16
Klaber v. Maryland Casualty Co., 69 F. (2d) 934 30
Kohler v. Kohler, 104 F. (2d) 38 30
Lockhard v. Mercer F. & M. Co., 53 F. Supp. 301 17
Macauley v. Waterman Steamship Corp., 327 U. S. 540 72
Manning v. Berdan, 132 Fed. 382 16
Morgan v. United States, 304 U. S. 1 ..... 39, 41
Myers v. Bethlehem Steel Corp., 303 U. S. 41 71
North American Co. v. Securities and Exchange Comm., 90 L. Ed., Adv. Ops. 737, 742, note 7 74
Ohio Valley Water Co. v. Ben Avon Burrough, 253 U. S. 287 ..... 38, 39
Omaha National Bank v. Federal Reserve Bank, 26 F. (2d) 884 26
Panama Refining Co. v. Ryan, 293 U. S. 388 ..... 38, 48, 50, 56
Port Angeles Western Rwy. Co. v. Clallam County, 20 F. (2d) 202 17
Railway Express Agency, Inc. v. Jones et al., 106 F. (2d) 341 ..... 24, 31, 78
Security Trust and S. B. Co. v. Lexington, 203 U. S. 323 47
Spellman v. Sullivan, et al., 43 F. (2d) 762; affd. 61 F. (2d) 787 15
Standard Surety Co. v. Baker, 105 F. (2d) 578 30
Sterling v. Constantin, 287 U. S. 378 65
Stricker L. & F. Co. v. Hogue, 7 F. Supp. 1002 17
Sunshine Coal Co. v. Adkins, 310 U. S. 381 45
Texas v. Florida, 306 U. S. 398 29
Treines v. Sunshine Mining Co., 99 F. (2d) 651, 308 U. S. 66 ..... 30, 85
United States v. Ruzicke, 327 U. S. 776 73
United States v. United Mine Workers, 91 L. Ed., Adv. Ops. 595 46

PAGE

Wichita Railroad & Light Co. v. Public Utilties Comm., 260 U. S. 48 ..... 39, 40

Wilcox, Homer Glen, v. Lieut. Gen. John L. DeWitt, 144 F. (2d) 353 21

Yick Wo v. Hopkins, 118 U. S. 356 ..... 39, 45

STATUTES

Bituminous Coal Act of 1937 (50 Stat. 72) 45

Bituminous Coal Conservation Act of 1935 (49 Stat. 991, Chap. 824) 44

Federal Rules of Civil Procedure, Rule 22 ..... 21, 23

Florida General Statutes of 1906, Sec. 2677 46

Home Owners' Loan Act, Sec. 1(a) 54

Home Owners' Loan Act, Sec. 5(a) 49

Home Owners' Loan Act of 1933, Sec. 5(d) (12 U. S. C., Sec. 1464; Chap. 64, Sec. 5, 48 Stat. 132 ..... 8, 11, 33, 35, 37, 38, 42, 43, 48, 58, 60, 62, 67, 69, 79

Home Owners' Loan Act of 1933, Sec. 5(i) 67, 76

Judicial Code, Sec. 24(26) (28 U. S. C. 41(26)) 78

Judicial Code, Sec. 57 (28 U. S. C., Sec. 118) 14, 18, 19, 26, 77, 78

Judicial Code, Sec. 57 (28 U. S. C., Sec. 380(a)) 8, 33, 36

United States Code, Title 28, Sec. 41(26), Mar. 3, 1911, Chap. 231, Sec. 24(26); Jan. 20, 1936, Chap. 13, Sec. 1, 49 Stat. 1096 ..... 6, 8, 21, 29, 36

United States Code, Title 28, Sec. 112 18

United States Constitution, Art. I, Sec. 1 ..... 38, 59

United States Constitution, Art. I, Sec. 8, Clause 18 ..... 38, 59

United States Constitution, Fifth Amendment 58

United States Constitution, Fourteenth Amendment 58

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Appellants.

vs.

PAUL MALLONEE, C. H. NEWHOUSE, WINNIE BUCKLIN, *et al.*

BRIEF OI APPELLEE, TITLE SERVICE COMPANY.

Comes now Title Service Company, one of the appellees in the above entitled and numbered proceeding and herewith presents its brief in the pending appeal.

Introduction.

By reason of the fact that this appellee is not affected by all of the Assignments of Error no attempt will be made herein to thoroughly meet all of the appellants' points raised on this appeal. Before entering into a detailed analysis of the facts and the law as the same per-

tains to this appellee, it is believed that a brief résumé of the factual background giving rise to the litigation will be of assistance to the Court. Thereafter, a detailed presentation of the appellees' points will be presented and supported.

Factual Background.

The per-emptory seizure by the appellants, Fahey and Ammann, of the assets of the financially healthy Long Beach Federal Savings and Loan Association on May 20, 1946, found this appellee, Title Service Company, holding the titles in trust for approximately 8000 privately owned homes, subject to over $12,000,000.00 indebtedness, and immediately entangled and clouded their titles in such a way as to require the protection by the trustee under the terms of its trust.

Title Service Company is a corporation duly organized and existing under and by virtue of the laws of the State of California. It conducts a business consisting of the handling of escrows for the sale and exchange of real property, the sale of personal property and of going businesses; acts as trustee under deeds of trust; and offers various other services in connection with property transactions. Its principle place of business is in Los Angeles County, California, and it maintains two offices therein, one located in the City of Long Beach, and the other in Bellflower, California.

Title Service Company is the trustee named in substantially all of the deeds of trust wherein the appellee, Long Beach Federal Savings and Loan Association, hereinafter referred to as the "Association" was the beneficiary prior to May 20, 1946. These trust deeds approximated 8000

in number and all covered real property located in southern California, most of which is located in or near the City of Long Beach in Los Angeles County. [R. 31.] The aggregate unpaid balance of the promissory notes secured by said deeds of trust is approximately twelve million dollars ($12,000,000.00). The great bulk of said trust deeds cover residence property used as homes for their owners although a few were on income producing properties. A sizable number of the loans secured by said trust deeds were on property upon which homes were in the process of construction and many of them are for ex-service personnel.

In California, virtually all security transactions in real property involve the use of trust deeds, mortgages being virtually unknown. Under the California practice the borrower executes a promissory note in favor of the lender and concurrently executes a deed of trust whereby he conveys the legal title to the real property securing the loan to a trustee, under a trust whereby the trustee holds the legal title, the borrower is the trustor and the lender is the beneficiary, said trust providing for the reconveyance of the title to the borrower upon his paying his note, or in case of default by the borrower and after notice from the beneficiary to the trustee of such default, a sale by the trustee, followed by the payment of the proceeds from said sale to the beneficiary to the extent necessary to satisfy the balance due upon the note. The deed of trust also casts certain responsibilities upon the trustee including the right and duty to defend the title to the real property. [R. 402.]

On May 20, 1946, the appellee, Title Service Company was the trustee under approximately eight thousand

(8000) deeds of trust valued at twelve million dollars ($12,000,000.00), wherein the Association was the beneficiary. On that date the appellant A. V. Ammann claiming to act under an order promulgated by the Federal Home Loan Bank Administration, seized the possession and control of the assets of the entirely solvent $26,000,000.00 Association as a purported conservator. Said seizure was accomplished with no notice of any kind being given to said Association or to Title Service Company, with no opportunity being afforded to either party to be heard by an impartial tribunal or in any other forum impartial or otherwise. [R. 5, 33, 35.]

Very shortly after said seizure to wit: on the 31st day of May, 1946, the appellant delivered to Title Service Company [R. 35] 174 promissory notes and 174 deeds of trust in all of which Home Investment Company of Long Beach, a Corporation, was the maker and trustor and Title Service Company the trustee and said Association was named as beneficiary, accompanied by requests for reconveyance of the title to the real property described in said deeds of trust. Said requests were executed by the appellant, A. V. Ammann, as the purported conservator for said Association. The face value of the promissory notes approximated $800,000.00.

Title Service Company had not at that time and to this date has not been, furnished any documentary evidence of the purported appointment of appellant Ammann as a conservator. That shortly thereafter, to wit: on the 4th day of June, 1946, Title Service Company was served by the United States Marshal for the Southern District of California, with an alias summons and a copy of the complaint of the plaintiffs and appellees, Paul Mallonee, *et al.*,

being served as John Doe 1. [Original Tr. p. 64 designated but omitted in printing.]

Said seizure by the appellants Fahey and Ammann followed very closely the same pattern as did the seizure by the same parties of the Federal Home Loan Bank of Los Angeles on March 29, 1946. That seizure was made entirely without notice, without any complaint having been made or any opportunity provided to comply with the demands of the appellants and without any prior demands having in fact been made. Not only was the Los Angeles Bank seized, but its assets were transferred to the Federal Home Loan Bank of Portland and said latter bank was, and all on the same day, March 29, 1946, likewise transferred to the Federal Home Loan Bank of San Francisco, which bank had not theretofore existed but which was created on the same date. All of this was accomplished in the United States. The basis for the transfers and mergers were Federal Home Loan Bank Administration Orders No. 5082 and 5083. [R. 349-350.] To add the final coupe de grace the Los Angeles Bank was by Federal Home Loan Bank Administration Order No. 5084, dissolved in its entirety. [R. 352.] With such known background it was highly necessary that Title Service Company take some affirmative step to protect itself and the trustors whose trustee it was.

That by virtue of the requests for reconveyance delivered to this appellee by the appellant A. V. Ammann and the service upon it of the alias summons and complaint Title Service Company found itself faced with conflicting claims and as a result found itself unable to comply with such requests for reconveyance without jeopardizing itself and probably making itself liable to the plaintiffs

and appellees if it did so comply. Therefore, in order to protect itself it had no other alternative than to avail itself of the protection afforded by the interpleader act, Title 28 U. S. C. Section 41 (26). At about the same time Title Service Company was notified by the appellee Association that said Association did not recognize the authority of said conservator and that if Title Service Company complied with any requests for reconveyances executed by said A. V. Ammann, that Title Service Company would be held liable in damages for any loss ensuing thereby.

By reason of conflicting claims, hereinabove set forth, in availing itself of the protection afforded by the interpleader statute, Title Service Company physically deposited the 174 promissory notes and deeds of trust hereinabove described, together with the requests for reconveyances thereof executed by appellant A. V. Ammann, in the Registry of the United States District Court for the Southern District of California, Central Division, in interpleader; and by Bill in the Nature of Interpleader brought before the court the question of the right to direct the reconveyance as to all of the some eight thousand (8000) parcels of real property in which it was the named trustee. These issues were raised in the cross-claim in interpleader and in the nature of interpleader filed by Title Service Company on the 4th day of June, 1946. [R. 30, *et seq.*]

That shortly after the seizure of the Association, the defendant and appellant, John H. Fahey, issued the order of the Federal Home Loan Bank Administration No. 5309, calling an administrative hearing to commence on July 3, 1946, for the purpose of allowing any party interested to appear and show cause why a conservator should

not have been appointed for said Association. That under the provisions of said order [R. 94] said hearing would have been held before a hearing officer who would be without authority to do other than take testimony, transcribe the same, and present the same to his superiors of the Federal Home Loan Bank Administration for their opinion as to the validity or regularity and fairness of their own actions. No notice of said hearing was given to this appellee, Title Service Company, other than the notice given by the publication thereof in the Federal Register in Washington, D.C., 3000 miles away. The holding of such an administrative hearing would, in the opinion of this appellee, have constituted an usurpation of the functions of the federal court and particularly the usurpation of the jurisdiction of the federal court wherein the instant litigation, was then pending. Since the filing of its cross-claim in interpleader and in the nature of interpleader submitted the same question to the federal district court, it was the opinion of the Title Service Company that such hearing could have no result other than to further complicate the titles to the eight thousand (8000) parcels of real property which it held in trust. By reason of the fact that in the deeds of trust, wherein legal title was conveyed to the appellee, there was also imposed the right and duty upon this appellee, as trustee, to protect the titles to such real property [R. 402, Par. 3]. Title Service Company felt it incumbent upon it to take the necessary steps to have such administrative hearing restrained. Therefore, on June 28th, 1946, Title Service Company filed in the trial court its motion for temporary restraining order to enjoin the holding of an administrative hearing, together with the necessary supporting documents. [R. 129, *et seq.*]

That the Federal District Court had the undoubted right to stay the holding of such administrative hearing, by appropriate injunctive proceedings, is shown from a reading of the provisions of the Interpleader Act, 28 U. S. C. 41 (26), subdivision (c), wherein it is provided that the court shall have power to enjoin the instituting or prosecuting of any suit on account of the property which is the subject matter of the interpleader or bill in the nature of interpleader. The Act provides for such injunction to operate whether the action be brought or is pending in any court of any State or the United States. Therefore, this appellee had the undoubted right to seek a restraining order to prevent the hearing of the matter before one of the claimants who was presuming to act in a quasi-judicial capacity to review his own act.

That by reason of the fact that injunctive relief was sought in the original complaint, which challenged the validity of Section 5(d) of the Home Owners' Loan Act of 1933, Title 12, U. S. C., Section 1464: c. 64, section 5, 48 Stat. 132, as amended, and by reason of the further fact that the motion to restrain the holding of the administrative hearing, hereinabove referred to, and similar motions made by the plaintiffs and appellees, Mallonee *et al.*, a statutory court, composed of three judges was requested to be convened pursuant to the provisions of Title 28, U. S. C., Section 380(a), Section 57, of the Judicial Code. Several orders designating three judges to hear the matter were issued, the last one of which was filed July 12, 1946. [R. 305.] Said court was ordered

to, and did, convene in Los Angeles, California, on July 15, 1946.

During the interim period before July 12, 1946, Home Investment Company of Long Beach, a corporation, the trustor under the 174 promissory notes and deeds of trust, interplead by this appellee, commenced a proceeding in intervention by which it sought to and was successful in being allowed to deposit the balance due on the promissory notes in the Registry of the Court and obtained reconveyances of title to its real property described in said deeds of trust. After due notice and hearing, the complaint in intervention of Home Investment Company of Long Beach, was filed on July 1, 1946 [R. 247]; thereafter and on July 12, 1946, the intervenor obtained an order directing the execution and filing in the trial court of requests for reconveyances by the directors of the Association, and the execution and filing therein of the necessary reconveyances by the appellee Title Service Company and allowing the deposit by said intervenor of the sum of $774,927.90, principal, plus interest, bonus, and trustees fees in the Registry of said court. The order was lodged with the clerk of the trial court on July 12, 1946, and thereafter filed on July 20, 1946. [R. 319, *et seq.*] In said order said money was ordered deposited in the registry of the court and "the rights hereto and existing of each and every party to this action, except as to the Intervenor Home Investment Company of Long Beach, a corporation, its successors and assigns, be, and the same are hereby reserved and pre-

served without prejudice and shall be enforced against the said sum of deposited money to all intents and purposes as though said reconveyances had not been executed and delivered pursuant to this 'order.'" [R. 321-322.] Thereafter, said money was actually deposited and now is in the custody of the Registry of the trial court, in interpleader.

That statutory court was convened on July 15, 1946, composed of the Honorable William E. Orr, Circuit Judge, and the Honorable Dave W. Ling and the Honorable Peirson M. Hall, District Judges. The matters on the calendar for hearing by the statutory court as reflected by the clerk's minutes were the following:

> "(1) Motion of plaintiffs for a preliminary injunction to restrain defendants from merging or consolidating the Long Beach Federal Savings and Loan Association or its assets with other institutions, and to take testimony, oral evidence at the hearing thereof, pursuant to notice thereof, filed June 14, 1946;
>
> (2) Motion of A. V. Ammann, both individually and as Conservator for the Long Beach Federal Savings and Loan Association to dismiss, pursuant to notice thereof, filed June 14, 1946;
>
> (3) Motion of plaintiffs for preliminary injunction to restrain the holding of an administrative hearing by the Federal Home Loan Bank Administration, *et al.*, pursuant to notice thereof, filed June 20, 1946;
>
> (4) Motion of interpleader, Ttile Service Company, for a preliminary injunction to restrain the holding of an administrative hearing by the Federal Home Loan Bank Board or Administration, *et al.*, pursuant to notice thereof, filed June 28, 1946;

(5) Motions of the plaintiffs to continue in force the temporary restraining orders to restrain the merging of the same Long Beach Federal Savings and Loan Association with any other institutions; and to restrain the holding of an administrative hearing by the Federal Home Loan Bank Board or Administration, until the final adjudication and determination on the motions for a preliminary injunction, pursuant to notice thereof, filed July 5, 1946;

(6) Motion of defendant John H. Fahey, individually, and as Chairman of the Federal Home Loan Bank Board, to dismiss or in lieu thereof, to quash service of summons, pursuant to notice thereof, filed, July 5, 1946;

(7) Motion of defendant A. V. Ammann, individually, and as a conservator for the Long Beach Federal Savings and Loan Association to dismiss answer and cross-claim in interpleader of Title Service Company, and Robert H. Wallis, pursuant to notice thereof, filed July 5, 1946." [R. 306-307.]

This hearing was continued to July 16, 1946, upon the same matters. [R. 317-318.] All of the motions were presented to the court and argued as reflected by the minutes. Thereafter, the matter was submitted upon the filing by all parties of a recompilation of applicable points and authorities within five days.

The statutory court rendered its decision and opinion which was filed on September 5, 1946 [R. 374-378], in which opinion this court held unanimously that section 5(d) of the Home Owners' Loan Act of 1933, Title 12, U. S. C., Section 1464(d), was unconstitutional, and void as attempting to delegate legislative power to the

Federal Home Loan Bank Administration and directed that judgment be rendered in accordance with that opinion. Appropriate findings of fact, conclusions of law, and decree were prepared and entered on September 30, 1946, wherein all of the motions which had been before the court on the hearings of July 15, 1946, and July 16, 1946, were disposed of and wherein it was ordered and directed that the possession of the Association be restored to its directors and officers, and wherein it was further determined that the title to the property which was the subject matter of the interpleader and bill in the nature of interpleader, filed by this appellee, Title Service Company, was in said Assocaition, and that the appellants, Fahey and Ammann, had no interest therein. [R. 489-499.] After the rendition of the opinion, and on September 14, 1946 [R. 390], a motion was filed by the plaintiffs and the defendant Association, concurred in by this appellee [R. 393] for temporary restraining order seeking to prevent the appellants from interfering with the operation of the Association. The basis for said motion was the maladministration of the affairs of the Association by the appellant Ammann to the irreparable damage of the members of the Association. [R. 391.] and that the granting of such restraining order would stop the depletion of assets by withdrawals which had then resulted in a material loss of assets of approximately $10,000,000.00. [R. 392.] Said motion was supported by the affidavit of the appellee, Mallonee, and numerous other persons, with exhibits attached. [R.

394-424.] That motion was denied. [Tr. 652, designated but omitted in printing.] Subsequent to the filing of the opinion by the trial court and prior to the entry of judgment, and on September 25, 1946, a request for stay of execution was filed by the appellant Ammann. [R. 465-466.] This request for stay of execution was denied by the Trial Court, unanimously, concurrently with the entry of judgment on September 30, 1946. [R. 465.] Immediately upon the entry of the judgment the officers and directors of the said Association were placed in partial possession of its assets and property by the U. S. Marshal for the Southern District of California, pursuant to a writ of assistance and possession issued by the trial court. [R. 502-506.]

Following the restitution of the possession of the property and assets of the Association to its officers and directors a motion was presented to Mr. Justice Rutledge, of this court, for a stay of execution. This motion was heard on October 1, 1946, and an order was made by Mr. Justice Rutledge staying the execution of the judgment of the trial court. Appellant Ammann has been, and now is, continuing to act as such conservator.

Almost immediately thereafter, an appeal was taken by the appellants to this court and a citation on appeal was issued by the Honorable Peirson M. Hall, one of the trial judges, on October 3, 1946. [R. 2-5 of original record. Omitted in printing.]

I.

Absolute Jurisdiction of Trial Court.

One of the assignments of error is that the trial court did not have jurisdiction of the action. This was raised by motions to quash returns of service of summons made by the appellant Fahey and motions to dismiss made by the appellant Ammann. Primarily, the action is one entirely *in rem*. The principle action was commenced pursuant to the provisions of Section 118, Title 28, U. S. C., Section 57 Judicial Code, and was brought for the purpose of removing the encumbrance, lien or cloud upon property within the district of the United States District Court, Southern District of California, Central Division, to wit: the claim of the appellants of the right to the possession and control of the assets of the Association. Although that section is too lengthy to herein set out in full, it definitely provides for an action such as this which is strictly *in rem*. After providing for the manner of acquiring jurisdiction of non-resident defendants by appropriate order and service the section provides as follows:

> "In case such absent defendant shall not appear, plead, answer, or demur within the time so limited, or within such further time, to be allowed by the court, in its discretion, and upon proof of the service or publication of said order and of the performance of the directions contained in the same, it shall be lawful for the court to entertain jurisdiction, and proceed to the hearing and adjudication of such suit in the same manner as if such absent defendant had been served with process within said district; but such

adjudication shall, as regards said absent defendant or defendants without appearance, *affect only the property which shall have been the subject of the suit* and under the jurisdiction of the court therein within such district; . . ." (Emphasis added.)

Two cases most nearly in point are:

Spellman v. Sullivan, et al., 43 F. (2d) 762, affirmed in 61 F. (2d) 787.

This action was a creditor's bill by which the plaintiff, a resident of Missouri, sought to reach the surplus of a trust fund in New York, of which the defendant, a resident of New Jersey, was the beneficiary. The action was brought in New York. The point was raised on a motion to dismiss made by the defendant upon a claim that the action should have been brought in the jurisdiction of which he was a resident. The trial court held, and the Circuit Court of Appeals affirmed, that the action was one sounding *in rem*, the *res* being the assets in New York. No judgment *in personam* was asked and, as stated in the opinion, in case of default by the defendant the only judgment that could be given would affect the *res*, and that to deny such jurisdiction would deprive the plaintiff of his remedy.

The second case is that of:

Bede Steam Shipping Co. v. New York Trust Co., et al., 54 F. (2d) 658, also on a motion to dismiss. The action was brought by a non-resident (British) company to enforce a lien on earnest money on deposit in New

York placed by a defendant resident of New Jersey, to secure the performance of a ship charter party. Following a dispute an award was made, in Admiralty, in favor of plaintiff and this action was brought to enforce that award. It was claimed by the defendant in support of his motion that the complaint not only sought to enforce the lien on the property in New York, but also prayed for a deficiency judgment against the defendant personally. In answer to this contention the court stated, page 661:

> "The defendant served outside the jurisdiction is protected in this regard by the provision of Section 118 that, if he does not appear in answer to the order served on him, the court in issuing the order for substituted service shall be limited in its decree, so far as he is concerned, to the lien sought to be foreclosed on the property within the district of suit and shall not have power to enter any decree *in personam* against him."

Other cases in point on the same question are:

Manning v. Berdan, 132 Fed. 382 (suit to enjoin collection of a note on which an equitable lien was asserted);

Kelleam v. Maryland Casualty Co., 112 F. (2d) 940 (suit to impress a trust on real and personal property);

Fischer v. American Life Ins. Co., 314 U. S. 549 (suit between receivers in different states, concerning title to and right to administer assets in possession of Iowa receiver);

All Continent Corp. v. Steelman, 86 F. (2d) 913, reversed in 301 U. S. 278 (suit to remove encumbrance and cloud on title to securities);

Clarke v. Boysen, 39 F. (2d) 800, certiorari denied 282 U. S. 869 (suit for removal of cloud from title);

Port Angeles Western Rwy. Co. v. Clallam County, 20 F. (2d) 202 (suit to remove tax lien);

Lockhard v. Mercer F. & M. Co., 53 F. Supp. 301 (suit to remove cloud on title to corporate stock and ownership thereof);

Stricker L. & F. Co. v. Hogue, 7 F. Supp. 1002;

Dick v. Foracker, 155 U. S. 404 (suit to remove cloud on title by tax sale).

In the instant case all of the necessary elements to jurisdiction are present. These elements are: (a) diversity of citizenship, (b) claim to or cloud on title to property, and (c) the requisite order for appearance served upon the non-resident defendant-appellant Fahey. That the appellant Fahey is a non-resident of California is evidenced by an affidavit filed on his behalf and made by Ray E. Dougherty in support of said appellant's motion to dismiss or in lieu to quash the return of service of summons, wherein it is stated the appellant Fahey is a resident and inhabitant of Swampscott in the State of Massachusetts. [R. 261] and that of the appellant. Ammamus is Silver Spring, Maryland, evidenced by the affidavit of Robert H. Wallis. [R. 304.] The same is further evidenced the amendment to the complaint filed by the plaintiffs and appellees, Mallonee *et al.*, on July 15, 1946, without objection, and which amendment has not been denied. [R. 312-315.] It is believed that the assets

of the solvent Association amounting to some $26,000,000.00, with a surplus of some $1,300,000.00, constitute "property" and that the handling and dealing therewith by the appellant Ammann undoubtedly constitutes a "cloud" on such title. [R. 5, 121, 285.]

It was claimed in the trial court by the appellant Ammann, in his motion to dismiss, that the action was governed by the provisions of Title 28, U. S. C. Section 112, and that the action should have been brought in the District of Columbia. That statute, however, refers only to actions brought by or on behalf of the United States, or any officer of the United States. The statute makes no reference whatsoever to suits brought against such officers. Therefore, the only implication that can be raised therefrom is that officers are subject to suit in any district in which the court otherwise has jurisdiction. A portion of sub-section (d) of that statute, as currently effective provides, in part as follows:

> ". . . but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suits shall be brought only in the district of the residence of either the plaintiff or the defendant . . ."

Said Section 112 also contains several exceptions, one of which is Section 118, the section under which the principle action in this case was brought.

II.

Fahey Not Indispensable Party.

The action at bar is one *in rem*—not *in personam*. No personal judgment is asked against the appellant Fahey, and under the provisions of the United States Code, Section 118, under which the original proceeding here was brought, no personal judgment could have been had against that appellant even if the action were one *in personam* unless he had seen fit to appear and submit himself to the jurisdiction of the court below. The only judgment which could have been rendered adverse to the appellant Fahey, if he did not appear, was the one which was rendered, *i. e.*, affecting the right to the possession and control of the assets and property of the Association.

That said appellant is not an indispensable party is demonstrated by numerous cases wherein the action of a subordinate of a governmental superior was enjoined from carrying out some administrative act on the grounds that the act sought to be enjoined was being done pursuant to an Act of Congress which was challenged as being unconstitutional. Some of these cases are:

Colorado v. Toll, 268 U. S. 228.

In this case the State of Colorado had sought to enjoin the local superintendent of a national park from carrying out park regulations in conflict with traffic regulations of the State of Colorado wherein the national park was located. The District Court dismissed the bill in a holding that the superior, the Secretary of Interior, was an indispensable party and had not been joined. In passing

upon the matter this Court stated through the late Mr. Justice Holmes:

> "The object of the bill is to restrain an individual from doing acts that it is alleged that he has no authority to do and that derogate from the quasi-sovereign authority of the State. There is no question that a bill in equity is a proper remedy and that it may be pursued against the defendant without either joining his superior officers or the United States. Missouri v. Holland, 252 U. S. 416, 431; Philadelphia Co. v. Stimson, 223 U. S. 605, 619, 620. As the bill was dismissed upon the merits it is not necessary to say more upon this preliminary question."

Also to be noted is:

> *Jarvis (Postmaster) v. Shachelton Inhaler Co.*, 132 F. (2d) 116,

wherein the court affirmed the judgment of the trial court in enjoining the interference with the defendant's business. In this case it was stated:

> "A stronger case for injunctive relief can hardly be stated. The Postmaster General did not seek to intervene. If he had done so, he would have been bound upon the question of the validity of the fraud order upon the record as made, just as we have indicated the appellee was bound by it . . ."
>
> "Courts of equity have always struggled against technical rules, which impede rather than contribute to substantial justice."

Certainly if a cabinet member is not a necessary party, or an indispensable party to a proceeding which is attacking one of his orders, the appellant Fahey is not such

an indispensable party to the determination of the constitutionality of an act under which he has presumed to act. Whether he be before the Court or not does not affect, one whit, the constitutionality of the Act or the jurisdiction of the Court to pass upon its constitutionality.

Other cases in the same vein are:

American School of Magnetic Healing v. McAnnulty, 187 U. S. 94;

Homer Glen Wilcox v. Lt. Gen'l. John L. DeWitt, 144 F. (2d) 353;

Esquire, Inc. v. Walker (Postmaster General), 55 Fed. Supp. 1015.

III.

Interpleader Confers Complete Jurisdiction.

Insofar as the cross-claims in interpleader and in the nature of interpleader brought by the appellee, Title Service Company, is concerned the jurisdiction is absolute in the District Court of the district wherein the property is located. This cross-claim was filed pursuant to the provisions of the Title 28, U. S. C. Section 41 (26), March 3, 1911, c. 231, Section 24 (26), as added Jan. 20, 1936, c. 13, Section 1, 49 Stat. 1096 and Rule 22, Federal Rules of Civil Procedure. This Section (41-(26)) provides as follows:

"The district courts shall have original jurisdiction as follows:

"(26) ORIGINAL JURISDICTION OF BILLS OF INTERPLEADER, AND OF BILLS IN THE NATURE OF INTERPLEADER. Twenty-sixth (a) of suits in equity begun by bills of interpleader or bills in the nature of inter-

pleader duly verified, filed by any person, firm, corporation, association, or society having in his or its custody or possession money or property of the value of $500.00 or more or having issued a note, bond, certificate, policy of insurance, or other instrument of the value or amount of $500.00 or more or providing for the delivery or payment or the loan of money or property of such amount or value, or being under any obligation written or unwritten to the amount of $500.00 or more, if—

(i) Two or more adverse claimants, citizens of different states, or claiming to be entitled to such money or property, or to any one or more of the benefits arising by virtue of any note, bond, certificate, policy, or other instrument, or arising by virtue of any such obligation; and

(ii) The complainant

(a) has deposited such money or property or has paid the amount of or the loan or other value of such instrument or the amount due under such obligation in the registry of the court there to abide the judgment of the court; . . . 'Such a suit in equity may be entertained although the titles or claims of the conflicting claimants do not have a common origin, or not identical but are adverse to and independent of one another.'

(b) Such a suit may be brought in the district court of the district in which one or more such claimants reside or resides.

(c) . . .

(d) . . .

(e) In any action at law in a United States District Court, against any person, firm, corporation, association or society such defendant may set up by way of equitable defense, in accordance with Section 398 of this Title, any manner which would entitle such person, firm, corporation, association, or society to file an original or ancillary bill of interpleader or bill in the nature of interpleader in the same court or any other United States district court against the plaintiff in such action at law and one or more adverse claimants under the provisions of paragraph (a) of this sub-section or any other provision of Part I of this Title and the rules of court made thereto. The defendant may join as parties to such equitable defense any claimant or claimants who are not already parties to such action at law. . . ."

This appellee, Title Service Company, availed itself of the provisions of the foregoing statute and Rule 22, F. R. C. P., together with the well established general equity practice by filing its answer and cross-claim in interpleader in the trial court on June 4, 1946. [R. 30-39.] An alias-summons was issued thereon [R. 39-40] and served upon the cross-defendants and appellants, Fahey and Ammann, in the manner prescribed by law, by the U. S. Marshall for the Southern District of California by mailing by registered mail a true and correct copy of said alias summons and answer and cross-claim in interpleader to the Attorney General of the United States at Washington, D. C., and by handing to and leaving true and

correct copies thereof with the United States Attorney at Los Angeles [R. 40-41]; and by service upon the cross-defendant and appellant John H. Fahey, as chairman of the Federal Home Loan Bank Board and as an individual, by personal service by the United States Marshal of the District of Columbia [R. 52-53] and by personal service on the appellant Ammann at Long Beach, California. In addition to the foregoing an order for service upon the absent defendant and appellant, John H. Fahey, as an individual and as chairman of the Federal Home Loan Bank Board, was obtained from the District Court on June 10, 1946 [R. 51-52] which order required said absent defendant to appear, move or answer said cross-claim in interpleader by August 19, 1946. Said order was served upon the said appellant Fahey by the United States Marshal for the District of Columbia on June 26, 1946. [R. 123-124.] By reason of the subsequent appearances in the action, coupled with the facts of service as hereinabove set forth, the jurisdiction of the trial court became complete and absolute.

The leading case covering federal jurisdiction in proceedings in interpleader, and the one most nearly in point in the instant case is that of:

Railway Express Agency, Inc. v. Jones, et al., 106 F. (2d) 341 decided by the Circuit Court of Appeals of the Seventh Circuit. The facts in that case are analogous to those in the case at bar in that a class suit was originally instituted by one Jones, who, with many other of diverse citizenship had been victims of a nationwide fraud, towit: the infamous Sir Francis Drake Estate solicitation. The proceeds of the fraud, in money, had been shipped by express and were actually in the

hands of the appellant express company when the fraud was discovered and the action filed. Jones, on his own behalf, and for the other victims, all of whose individual losses had been less than $500.00, but which aggregated in excess of $24,000.00, commenced an action against the perpetrators of the fraud and the express company. The appellant express company filed an affirmative defense by a bill in the nature of interpleader admitting the possession of the funds, admitting no interest therein, but alleging the adverse interests of the plaintiff and other members of the class represented by him on the one hand, and the claim of the Collector of Internal Revenue who had appeared in the action and asserted a claim and lien on the funds by reason of non-payment of income tax by the principal perpetrator of the fraud on the other hand, the unpaid tax being far in excess of the money held. The motion of the express company to be allowed to interplead was, by the trial court, denied, and the express company appealed. The two points raised on appeal were: (1) the right of Jones, based on the pleadings, to maintain a class suit, and (2) whether or not the express agency was within its rights in filing a counter-claim setting forth a cause of action in the nature of interpleader. The Circuit Court of Appeals held that whether or not any of the individual claimants had claims within the statutory amount, (over $500.00), the express company was entitled to file its equitable defense in interpleader and the court stated at page 344:

> "Where the possessor of funds can establish the essential and jurisdictional facts prescribed in the statute, his right to relief under this section (41) (26) is absolute."

and at page 345:

> "By proceeding under the counter-claim of the railway express the jurisdiction of the court was unassailable and the claims of all claimants may be litigated exactly the same as in a proper class suit.
>
> "It therefore follows that as a matter of wise discretion, *as well as of recognizing a right which the railway express possessed absolutely*, the court should, after the counter-claim was filed, have proceeded as provided for in the interpleader statute." (Emphasis added.)

The foregoing case is very well reasoned and appears to set at rest the question of jurisdiction in those cases anticipated by subdivision (c) of the interpleader statute, *supra*, of the rights to introduce an equitable defense in interpleader or by bill in the nature of interpleader. It likewise conclusively established the jurisdiction in the district court to take and maintain jurisdiction of all other parties to the action regardless of whether or not the court would otherwise have had jurisdiction of them. This case is likewise authority for the bringing of a class action as was filed by the plaintiffs and appellees Maltonee, *et al*.

This appellee, Title Service Co., physically deposited 174 deeds of trusts and promissory notes in the Registry of the Court. That these documents fall within the definition of "property" is very definitely established by the case of:

Omaha National Bank v. Federal Reserve Bank, 26, F. (2d) 884 wherein the contention was made that bank credits were not property within the purview of Section 118, Title 28, U. S. C., and that actual cash represented

thereby would have been "property" within the meaning of the statute. In that case the Circuit Court of Appeals held, in no uncertain terms, that the evidence of the deposit of cash, in the form of bank credits was very definitely "property."

In fact, the promissory notes secured by the deeds of trust, which were physically deposited in the Registry of the Court, were transmuted into actual cash in the course of the intervention by the Home Investment Company of Long Beach, a California corporation, as described in the statement of facts, *supra*. By the order of the trial court made on July 12, 1946, lodged with the Clerk on July 12, 1946, and filed on July 20, 1946, said Home Investment Company was allowed to, and did, deposit the sum of $774,927.90, principal, interest and costs together with interest at the rate of $95.217, per day thereafter, plus the sum of $7,972.50 as bonus due the Federal Housing Authority, plus a reconveyance fee in the sum of $435.00. Therefore, prior to the taking of the appeal this amount of money had been physically deposited with the trial court and by its order the trial court held the same in lieu of the promissory notes and trust deeds deposited by this appellee and stated that the "said amount shall remain on deposit in the registry until the further order of this court, and the rights heretofore existing of each and every party to this action, except as to the intervenor Home Investment Company of Long Beach, a corporation, its successors or assigns, be and the same are hereby expressly reserved and preserved without prejudice and shall be enforced against the said sum of deposited money to all intents and purposes as though said reconveyances had not been executed

and delivered pursuant to this order." [R. 322.] Therefore, we find that an equitable conversion has taken place and that a pure interpleader exists as to said amount of money. Subsequent to the handing down of the opinion by the trial court and prior to the entry of judgment, to-wit: on September 25, 1946, another intervention proceeding was filed by one Michael J. O'Rourke [R. 485], which intervention was completed on Oct. 7, 1946, with the making of an order by the trial court directing the deposit of the sum of $3,456.03 principal, $34.06 interest, and a reconveyance fee. [R. 513.] Since the taking of the appeal numerous other intervention proceedings have been filed, some of which have been completed, and all of which result in the payment of additional money into court and all of which affect some of the eight thousand (8,000) other promissory notes and deeds of trust brought before the court by the portion of the cross-claim by this appellee in the nature of interpleader.

Title Service Company, appellee herein, has the same rights by reason of this bill in the nature of interpleader that it had in its strict interpleader and the District Court was vested with the same jurisdiction thereby that it had by reason of the filing of the strict interpleader. By reason of the fact that under the terms of the trust imposed upon Title Service Company by the deeds of trust it is required to defend the titles to the real property conveyed to it, in trust, it has been necessary that Title Service Company continue an active participation in the course of the litigation. This in no way deprecates its position in its bill in the nature of interpleader. The fact that a party to an action does have an incidental interest, such as the interest of Title Service Company,

may take advantage of the interpleader statute. Title 28 U. S. C. Section 41 (26), *supra*, is borne out by numerous cases. One of these is the case of:

Texas v. Florida, 306 U. S. 398.

This was a case wherein inheritance taxes were sought to be collected from the estate of Green, the son of the well known Hetty Green, by the states of Texas, Florida, New York and Massachusetts. The estate itself did have an active interest by reason of the fact that it was possibly liable to the assessment and collection of inheritance taxes by any or all of the four states. However, in the opinion it was held that the estate representative was very properly a party to the action in the nature of interpleader (p. 406), admitting the liability to some one state but denying liability to all, and praying that the court determine to which state the estate was liable. Another excellent case holding that a bill in the nature of interpleader is sufficient to vest jurisdiction is:

Hunter v. Federal Life Ins. Co., 111 F. (2d) 551,

which was a dispute between parties entitled to the proceeds under a policy of life insurance on which changes of beneficiary had been requested but not completed prior to death. The life insurance company interpleaded and deposited the proceeds of the policy in court. A defense was raised of no proper interpleader. The court stated at page 556:

> "It would serve no useful purpose to discuss the sufficiency of the averments of the bill as a strict bill of interpleader, since it was clearly sufficient as a bill in the nature of interpleader, which may be maintained by one who is not a mere stakeholder."

Other cases to the same effect are:

Kohler v. Kohler, 104 F. (2d) 38;

Klaber v. Maryland Casualty Co., 69 F. (2d) 934;

Standard Surety Co. v. Baker, 105 F. (2d) 578;

Treines v. Sunshine Mining Co., 99 F. (2d) 651, 308 U. S. 66.

It is not necessary that all of the claimants even have a valid claim to the property which is the subject matter of the interpleader or in the bill in the nature of interpleader. This point was decided in the well reasoned case of;

Harris v. Traveler's Insurance Co., 40 F. Supp. 154, 157.

In that case in answer to a motion to dismiss for lack of conflicting claims the court stated at page 157:

> "It thus becomes clear that the jurisdiction of this court to entertain an interpleader bill does not depend on the validity or even bona fides of the claims of the respective defendants. It is obvious that in almost any case the claim of one of the parties will ultimately be determined to be invalid, but, however, it is a matter for determination at the trial and cannot affect the jurisdiction of the court. As we have shown, the purpose of the interpleader bill is as much to protect a stakeholder from the expense of double litigation, however groundless. That, in the opinion of the court, he will ultimately escape the latter is no ground for refusing the interpleader."

Thus it is seen that although the appellants Fahey and Ammann have claimed in the trial court that they are

in fact, the association, and that they act for and on its behalf, and that there cannot, therefore, be any conflicting claims, that the court nevertheless had jurisdiction to entertain the cross-claim of Title Service Company. Upon the showing made by this appellee, Title Service Company, that it was faced with conflicting demands by the appellants, on the one hand, and by the plaintiffs and the Association, on the other hand, it had an absolute right to avail itself of the benefits of the interpleader statute, and the trial court had no alternative other than to accept jurisdiction. Under the doctrine enunciated under the *Railway Express v. Jones*, case, *supra*, the jurisdiction conferred by the interpleader and bill in the nature of interpleader, required the trial court to accept jurisdiction as to the other parties, even though it should have decided that it had no original jurisdiction for any other reason. The pleadings of Title Service Company showed all of the necessary elements to an interpleader, to wit:

(1) Diversity of citizenship, plaintiffs and association being residents of California and the appellants Fahey and Ammann being residents of Massachusetts and Maryland, respectively;

(2) Property in issue of a value in excess of $500.00, to wit; of approximately $800,000.00, actually deposited and titles to approximately 800 parcels of real property as security for notes with an unpaid balance in excess of twelve million dollars ($12,000,000.00) being before the court; and

(3) A stakeholder whose primary interest is in the protection of the titles to the real property vested in it as trustee in its deeds of trust.

IV.

Duty of Trustee to Protect Titles.

As above set forth, under the provisions of the deeds of trust wherein this appellee, Title Service Company, is named as the trustee, it is charged with the duty of defending the title to all of the real property which is the subject matter of said deeds of trust. If, as was urged by the appellants, in the trial court, unsuccessfully, the action should have been brought in the District of Columbia rather than in California, the situs of all of such real property, the question is asked: "How would it have been possible for the various borrowers, the title to whose property was involved, to have defended the same three thousand miles from the place where such property is located" It is an elemental and rudimentary rule of law that an action involving title to real property is strictly local and the only courts having jurisdiction thereof are those in the district where the property is physically located.

V.

Court Has Jurisdiction.

In view of all of the foregoing it is respectfully submitted that the District Court of the Southern District of California, Central Division, had absolute jurisdiction of the subject matter of this action, and that the various motions made by the appellants, Fahey and Ammann, in the trial court to dismiss the same or to quash the return of the service of summons were properly denied. That these motions were properly and adequately considered

is evidenced by the minutes of the trial court for July 15 and 16, 1946, inclusive, *supra* [R. 522 *et seq.*, 539 *et seq.*], and in the Findings of Fact, Conclusions of Law and Judgment. [R. 489, *et seq.*, at p. 491-492 and p. 495-496.]

VI.

Pleadings Filed by This Appellee Raised Issues of Unconstitutionality.

The two major issues raised by the pleadings of Title Service Company were: (1) The right to the possession and control of the interplead property as between the plaintiffs and appellees, Shareholders Committee, and the officers and directors of the Association, on the one hand, and the appellants, Fahey and Ammann, on the other; and (2) the issuance of an injunction to stay the holding of an administrative hearing called by the appellant Fahey.

The issue as to the first point raised, to wit: the right to the possession of the interplead property would necessarily result from the determination of the right to an injunction as prayed for in the complaint of the plaintiffs and appellees, Shareholders Committee. This complaint definitely raised the issue of the constitutionality of Section 5 (d) of the Home Owners' Loan Act of 1933, as amended, Title 12, U. S. C. Section 1464, c. 64, Section 5, 48 Stat. 132, June 13, 1933. [R. 11-12.] Therefore, by reason of the provisions of Title 28, U. S. C. Section 380 (a) the determination of this matter required a hearing before a court composed of three judges, since the complaint prayed for injunctive relief based upon the unconstitutionality of said Section 5 (d). [R. 15-16.]

The issue as to the second point raised, to wit: The issuance of an injunction to stay the holding of an administrative hearing was precipitated by the issuance of an order for the holding of an administrative hearing, Federal Home Loan Bank Administration Order No. 5309 [R. 94-96], which would have required the holding of an administrative hearing to commence on July 3, 1946, wherein any party interested would be allowed to appear and show cause why a conservator should not have been appointed for said Association. Under the terms of this order it is further provided:

> "That after the close of the hearing the said Hearing Officer shall transmit as promptly as possible to the Secretary of the Federal Home Loan Bank Administration a complete transcript of the testimony taken together with any exhibits, briefs, or other material incorporated in the record of said hearing;" [R. 96]

That said order, by its terms, was apparently for the purpose of enabling the appellant Fahey to pass upon the validity of his own acts. At the time of the issuance of said order, the matter of the determination of the constitutionality of the Acts of Congress under which the appellants presumed to act had already been presented to the Federal District Court, Southern District of California, said order having been issued on June 5, 1946. As construed by Title Service Company, this order and hearing could have no effect other than to amount to an attempted usurpation of the power and jurisdiction of the Federal District Court to hear and determine the same matter. By reason of the fact that the cross-claim in interpleader and in the nature of interpleader had already been filed in the District Court by this ap-

pellee, and 174 promissory notes and trust deeds had already been physically deposited in the Registry of the Federal District Court, the District Court had jurisdiction of the subject matter. The subject matter included the determination of whether or not the appellant Ammann had authority to issue requests for reconveyances. Further, it was the opinion of Title Service Company that any finding or adjudication made by the Federal Home Loan Bank Administration might, and probably would, be in conflict with the judgment to be made by the Federal District Court after a hearing. That this opinion was well taken is demonstrated by the fact that the local Federal District Court did make its judgment on September 30, 1946, adjudging, among other things, that the appellants had no right or interest in or to any of the interplead property or the property which had theretofore been brought before the court by its bill in the nature of interpleader. [R. 499, par. 10.] Therefore, the holding of such administrative hearing could have no result other than to further complicate the clouded titles to the approximately eight thousand (8000) parcels of real property covered by the deeds of trust wherein Title Service Company was named as trustee and charged with the defending of said titles, and usurp the functions of the trial court. Therefore, it was incumbent upon Title Service Company to attempt to enjoin the holding of such administrative hearing. Since the order, No. 5300 *supra*, was issued pursuant to the power believed by the appellants to exist under the provisions of Section 5 (d) of the Home Owners' Loan Act of 1933, cited above in full, the enjoining of such a hearing would necessarily constitute an attack upon the constitutionality of that Act, and would necessarily be heard by a three-

judge court pursuant to the provisions of Title 28, U. S. C. Section 380 (a). Therefore, Title Service Company filed its motion to restrain the holding of such administrative hearing. [R. 253, *et seq.*] This was a right which was given to the interpleader by 28 U. S. C. 41 (26) (e), *supra*.

This order, No. 5309, was almost as much a flaunting of the jurisdiction of the courts as was "Bulletin No. 54" of the Federal Home Loan Bank Administration, *infra*.

FLAUNTING JUDICIAL AUTHORITY.

As an example of the extremes to which the appellant, Fahey has gone in the exercise of the power with which he believes he is vested in the right conferred upon him to adopt "regulations" and issue and promulgate "rules", which even go so far as to flaunt the authority of the federal courts, is his "Bulletin 54" issued on March 25, 1946, and published in the Federal Register as Document 46-4948 [R. 361-363], whereby he sought to even preclude the officers and employees of the Federal Home Loan Bank Administration from even complying with a lawfully issued *subpoena duces tecum*. A portion of that document is quoted [R. 362]:

> "All such officers and employees are hereby prohibited from giving out any official information obtained by any one of them on behalf of the Federal Home Loan Bank Administration, or any of such records, to any private person or to any local officer or *to any Court, including the production of such records or copies thereof made pursuant to their official duties, whether in response to a subpoena duces tecum or otherwise.*" (Emphasis added.)

VII.

Section 5(d) of the Home Owners' Loan Act of 1933, as Amended, Is Unconstitutional.

The section of the Home Owners' Loan Act of 1933, as amended, Title 12, U. S. C., Section 1464; c. 64, Section 5, 48 Stat. 132, under which the appellant Fahey purported to act in the appointment of the appellant Ammann, as a conservator for the Association is subdivision (d) of said Section 5. That subdivision provides as follows:

> "The Board shall have full power to provide in the rules and regulations herein authorized for the reorganization, consolidation, merger, or liquidation of such association, including power to appoint a conservator or a receiver to take charge of any such association, and to require an equitable readjustment of the capital structure of the same; and to release any such association from such control and permit its further operation."

The power to adopt regulations, referred to in subsection (d) is contained in subsection (a) of said Section 5. This subsection provides as follows:

> "In order to provide mutual thrift institutions in which people may invest their funds and in order to provide for the financing of homes the board is authorized, under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, operation, and regulation of associations to be known as 'Federal Savings and Loan Associations' and to issue charters therefor, giving primary consideration to the best practices of local, mutual, thrift and home financing institutions."

It must be noted from a most casual reading of said sub-section (d) that no provision of any kind or nature is made for any hearing before any judicial or quasi-judicial tribunal before the doing of any act set forth in said sub-section, including the appointment of a conservator, and no provision is made for any review of such acts, including the appointment of a conservator, by any judicial or quasi-judicial body. The matter is left entirely within the power of the board to legislate as it may see fit in that it is given unlimited power to "provide in the rules and regulations herein authorized . . . including power to appoint a conservator." No limitation is placed upon that power and no conditions precedent are made as a basis for the exercise of the power. This certainly amounts to an unlawful delegation of legislative authority and is a violation of the inherent constitutional prohibition against unlimited delegation of legislative authority. These subdivisions, (a) and (d), of Section 5 of the Act attempt to delegate legislative functions without providing any statement of policy, standards, limitations, or any criteria, to guide an administrator or the Board in exercising such legislative functions, all of which is contrary to Article I, Section 1, and Article I, Section 8, clause 18 of the Constitution of the United States of America.

Some of the "land mark" cases dealing with and disposing of this position are as follows:

A. L. A. Schechter Poultry Corp. v. United States, 295 U. S. 495;

Panama Refining Co. v. Ryan, 293 U. S. 388;

Ohio Valley Water Co. v. Ben Avon Burrough, 253 U. S. 287;

Wichita Railroad & Light Co. v. Public Utilities Comm., 260 U. S. 48;

Morgan v. United States, 304 U. S. 1;

Butler v. United States, 297 U. S. 1;

Carter v. Carter Coal Co., 298 U. S. 238;

Yick Wo v. Hopkins, 118 U. S. 356;

Coe v. Armour Fertilizer Works, 237 U. S. 413.

Of the cases cited above the following are probably the most nearly in point in the instant litigation.

Ohio Valley Water Co. v. Ben Avon Burrough, 253 U. S. 287. This was a case involving rate making by the public service commission of Pennsylvania. The State Supreme Court of Pennsylvania had held the Act to be constitutional but this holding was reversed in this Court on the question of a mandatory right to a judicial review being required to establish the constitutionality of the Act. In its decision at page 289 the court stated:

> "Looking at the entire opinion we are compelled to conclude that the Supreme Court (State) interpreted the statute as withholding from the courts power to determine the question of confiscation according to their own independent judgment when the action of the commission comes to be considered on appeal,"

and at page 291:

> "Plaintiff in error has not had proper opportunity for an adequate judicial hearing as to confiscation; and unless such an opportunity is now available and can be definitely indicated by the Court below in the exercising of its power to finally construe the laws of the state, the challenged order is invalid."

Thus it is seen that the absence of an adequate opportunity for a hearing being provided in the statute of a state, that the statute is invalid, being a deprivation of property without due process of law.

Another case in which the decision of a state court was under review in a matter involving a statute which purported to delegate legislative power, the power to make regulations, but which did not provide adequate safeguards or guides is:

Wichita Railroad and Light Co. v. Public Utilities Comm., 260 U. S. 48,

wherein the court states at pages 58-59:

> "The maxim that a legislature may not delegate legislative power has some qualifications, as in the creation of municipalities, and also in the creation of administrative boards to apply to the myriad details of rate schedules and the regulatory police power of the state. The latter qualification is made necessary in order that the legislative power may be effectually exercised. In creating such an administrative agency, the legislature, to prevent it being a pure delegation of legislative power, must enjoin upon it a certain course of procedure and certain rules of decision in the performance of its function. It is a wholesome and a necessary principle that such agency must pursue the procedure and rules enjoined, and show a substantial compliance therewith to give validity to its action."

From the foregoing quoted portion of this decision it is evident that the legislature must first provide for the making of regulations and set up the standards which the regulations must follow and that an administrative agency must show a substantial compliance with the rules set forth

by the legislative body. In the present case no standard whatsoever has been established and the power has been left in the Federal Home Loan Bank Administration apparently in the person of its Commissioner, the appellant Fahey, to make any and all regulations which he might see fit. This is a clear and absolute disregard for the constitutional provisions requiring the setting of standards.

An excellent discussion and reasoning of the effect of the failure of the legislative body to set up the necessary safeguards is that contained in:

Morgan v. United States, 304 U. S. 1.

The case itself did not go up on appeal by reason of the failure of the statute to provide the necessary safeguards, but upon an abuse of those safeguards in the administration of the statute. However, it does point out with great particularity what such safeguards and standards must be. It is a case wherein the Secretary of Agriculture, after the holding of very extensive hearings in connection with the establishment of prices for live stock, undertook to make the rate without due consideration for the facts adduced at the hearings themselves. As stated at page 14:

> "The first question goes to the very foundation of the action of administrative agencies entrusted by the Congress with broad control over activities which in their detail cannot be dealt with direcly by the legislature. The vast expansion of this field of administrative regulation in response to the pressure of social needs is made possible under our system of adherance to the basic principles that the legislature shall appropriately determine the standards of administrative action and that in quasi-judicial proceedings the liberty and property of the citizen shall be protected by

> the rudimentary requirements of fair play. These demand a 'fair and open hearing' essential alike to the validity of the administrative regulation and to the maintenance of public confidence in the value and soundness of this important governmental process. Such a hearing has been described as an 'inexorable safeguard' . . . . and in equipping the Secretary of Agriculture with extraordinary powers under the Packer's and Stockyards Act the Congress recognized and emphasized this requirement by making his action depend upon 'FULL HEARING'." (Emphasis by the Court.)

The following language which appeared on page 17 might well be used in referring to the power to appoint a conservator:

> "but a 'full hearing'—a fair and open hearing—required more than that. The right to a hearing embraces not only the right to present evidence, but also the opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right may be a barren one. Those who are brought into contest with the government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the government proposes and to be heard upon its proposals before it issues its final command."

Even if the provisions of Section 5(d) of the Home Owners' Loan Act of 1933 had included as a condition precedent, the holding of an administrative hearing, upon which it is entirely silent, the foregoing language would have been most applicable to it. However, since the Act did not contain any such provision, and in the exercise of its legislative power claimed to have been conferred upon

it by said sub-section, the Federal Home Loan Bank Administration attempted to supply the same by providing its own administrative hearing. Without admitting that such an administrative hearing, if provided for to be held prior to the appointment of a conservator, would have in any way strengthened the position of the appellants, it is definitely noted and the attention of the court is invited to the fact that such administrative hearing is only provided for after the seizure of the property by a conservator. The following language taken from page 22, is illustrative of what an act should contain which purports to make such delegation of legislative discretionary power as does that in the instant case:

> "The maintenance of proper standards on the part of administrative agencies in the performance of the quasi-judicial functions is of the highest importance and in no way cripples or embarrasses the exercise of their manifest interest. For, as we said at the outset, if these multiplying agencies deemed to be necessary in our complex society are to serve the purposes for which they are created and endowed with vast powers, they must accredit themselves by acting in accordance with the cherished judicial tradition embodying the basic concept of fair play."

That there was not only a total absence of any requirement for a hearing prior to the appointment of a conservator of this fully solvent institution, as is seen from an inspection of said section 5(d) of the Home Owners' Loan Act, but that the manner in which the seizure was accomplished was the absolute opposite of that contemplated by the Supreme Court in the foregoing language is evidenced from the affidavits of Keith Linden [R. 62-72], Ben O. Reddick [R. 73-75], T. A. Gregory [R. 118-123].

Another case wherein an Act of Congress has been declared to be unconstitutional because of the attempted improper delegation of legislative powers to an executive officer, the Secretary of Agriculture is the case of:

Butler v. United States, 78 F. (2d) 1, affirmed in 297 U. S. 1,

wherein the Agricultural Adjustment Act was held to be unconstitutional. The following statement of law appears on page 9 of the opinion of the Circuit Court of Appeals:

> *"The powers to determine what the law shall be, what property shall be affected by taxation or regulation and what standards shall govern the administrative officers in administering acts of Congress has never been held to be an administrative function.* The power to impose a tax and to determine what property shall bear the tax can only be determined by the legislative department of the government. If Congress undertakes to lay down a guide for administrative officers to enforce it in carrying out its mandate, it must be by an intelligible and a reasonably definite standard." (Emphasis added.)

Another act which was held to be unconstitutional by reason of an insufficient safeguard for the adoption of regulations by an administrative body was the Bituminous Coal Conservation Act of 1935 (49 Stat. 991, C. [redacted]). This act was held unconstitutional in the case of:

Carter v. Carter Coal Co., 298 U. S. 238.

In commenting upon the purpose of the legislation the court stated at page 291 as follows:

> "Beneficent aims, however great or well directed, can never serve in lieu of Constitutional Power."

Following this decision the Act was reenacted with appropriate standards and criteria, "Bituminous Coal Act of 1937 (50 Stat. 72) and in the case of *Sunshine Coal Co. v. Adkins,* 310 U. S. 381, was subsequently held to be constitutional. As re-written the act is a good example of properly drafted legislation as it provides the necessary safeguards of due process, notice and hearings prior to the adoption of rules and regulations and also notices of charges, opportunities to be heard, and impartial hearings together with the right to judicial review. Undoubtedly, had the act here under attack contained only a provision for a notification of charges prior to the appointment of a conservator and a judicial review following the appointment of a conservator the same would have been constitutional. However, the absolute lack of due process by the failure to provide for any notice, hearing or judicial review in the act itself is fatal.

One of the most famous cases on the question of unlawful and unlimited delegation of legislative power is the case of:

Yick Wo v. Hopkins, 118 U. S. 356.

This case is undoubtedly a landmark in American judicial history and does not need digesting or citation for the benefit of this Court. As the Court will so well recall, it is the case involving the plaintiff, Yick Wo, and approximately 80 other Chinamen, all aliens, who operated laundries in the City of San Francisco. The San Francisco ordinance gave unlimited authority to the licensing authorities to grant or deny licenses and, under this authority, the Chinese were denied licenses although all Caucasian applicants, with one exception, were granted licenses. This court held, in no uncertain terms, that the ordinance was

unconstitutional and discriminatory as it conferred (p. 366):

> "Not a discretion to be exercised upon the consideration of circumstances of each case, but an ordinance granting power to give consent not only as to place but as to persons."

This was one of the cases which again enunciated the principal "ours is a government of laws and not of men," which has been carried down from the days of Thomas Jefferson and was most recently included in the opinion of Mr. Justice Frankfurter in the case of *United States v. United Mine Workers* (91 L. Ed., Adv. Op. 595).

Another case which bears particularly upon the subject of due process of law, and the possible attempt to cure the same by the voluntary granting of an "administrative hearing," and in which the language is strictly apropos is:

Coe v. Armour Fertilizer Works, 237 U. S. 413.

This case involved the constitutionality of Section 2677 of the Florida General Statutes of 1906, as amended, which provided that judgments against corporations could be converted into judgments against stockholders in those corporations, without a hearing, was unconstitutional as it permitted the taking of property without providing due process of law and the opinion also set forth the doctrine that the notice must be provided in the statute. In that opinion it was stated:

> "Thus construed, and as applied in this case, we think Section 2677 is repugnant to the 'due process of law' provisions of the Fourteenth Amendment, which requires at least a hearing, or an opportunity to be heard, in order to warrant the taking of one's prop-

erty to satisfy his alleged debt or obligation; and in our opinion the other sections do not adequately supply the defect."

". . . To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result as he had no defense upon the merits. (Reese v. Watertown, 19 Wall. 107, 123; 22 L. Ed. 72, 77.)

"Nor can extra-official or casual notice, or the hearing granted as a matter of favor or discretion, be deemed a substantial substitute for the due process of law that the Constitution requires. In Stuart v. Palmer, 74 N. Y. 183, 188, 30, Am. Rep. 289, which involved the validity of a statute providing for assessing the expense of a local improvement upon the lands benefited, but without notice to the owner, 'it is not enough that the owners may by chance have notice, or that they may as a matter of favor have a hearing. *The law must require notice to them and give them the right to a hearing and an opportunity to be heard.*'" (Emphasis by the court.)

Another case with very pertinent language is that of:

Security Trust and S. B. Co. v. Lexington, 203 U. S. 323, 333,

wherein the court, speaking through Mr. Justice Peckham, stated:

"If the satute did not provide for a notice in any form it is not material that as a matter of grace or favor, notice may have been given of the proposed assessment. It is not what notice, uncalled for by the statute, the taxpayer may have received in a particular case that is material, but the question is whether any notice is provided for by the statute."

In one of the later cases and one very nearly here in point on the question of the sufficiency of an act of Congress, or the insufficiency thereof, in attempting to delegate unauthorized legislative power, is that of:

Panama Refining Co. v. Ryan, 293 U. S. 388.

This case originated as an action to restrain the Secretary of the Interior from the enforcement of certain provisions having to do with the transportation in interstate commerce of petroleum and petroleum products in excess of the amount allowed to be produced under state regulations, the regulations having been authorized in the National Industrial Recovery Act. There, as in the case at bar, one section purportedly authorized the administrative officer to do certain acts and a prior section set forth the general purposes and polices of the Act, even as subsection 5(d) of the Act here under consideration purports to authorize the adoption of regulations and subsection 5(a) sets forth the purposes and policies of the Act. There, as here, it was claimed that the Act contained an unconstitutional delegation of power without the setting of sufficient standards, safeguards, curbs or other criteria, and, there as here it was sought to read into the empowering section such standards from a consideration of the policy stating section which preceded it. The following quoted portions of the opinion written by Chief Justice Hughes bear directly on that subject, p. 415:

> "Section 9(c) does not state whether, or in what circumstances or under what conditions, the President is to prohibit the transportation of the amount of petroleum or petroleum products, produced in excess of the states' permission. It establishes no criteria to govern the President's course. It does not

require any finding by the President as a condition of his action. The Congress in Sec. 9(c) thus declares no policy as to the transportation of the excess production. So far as the section is concerned it gives the President unlimited authority to determine the policy as to lay down the prohibition, or not to lay it down, as he sees fit."

In commenting on the policy provisions of the act, the Court might well have been speaking of the statute here under consideration when it stated at page 418:

"The Congress left the matter to the President without standard or rule to be dealt with as he pleased. The effort by ingenious and diligent construction to supply a criterion still permits such a breadth of authorized action as essentially to commit to the President the functions of a legislature rather than those of an executive or administrative officer executing a declared legislative policy. We find nothing in section 1 which limits or controls the authority conferred by section 9(c)."

In applying the foregoing quotation to the policy provided by section 5(a) of the Home Owners' Loan Act we find the only policy there established is "giving primary consideration to the best practices of local mutual thrift and home financing institutions in the United States." Certainly, if standards set by a state in the limitations of the production of petroleum and petroleum products within the confines of its own borders is not considered as being sufficient, a broad and meager reference to "the best practices of local mutual thrift and home financing institutions in the United States" is too broad to be a sufficient guide or curb on the administrative officer seeking to apply them.

May it be said that such best practices in Maine are the same as those in California or that the practices in a congested metropolitan area in the east is the same as that in the far west where communities are expanded in size and where tenements are virtually unknown?

Again, the opinion in the *Panama Refining* case bears upon the contention of the appellants heretofore made before the trial court in both oral and written argument that the Commissioner might be depended upon to administer the act in good faith and good conscience. At page 420 it is said:

> "The question whether such a delegation of legislative power is permitted by the constitution is not answered by the argument that it will be assumed that the President has acted, or will act, for what he believes to be the public good. *The point is not one of motives but of constitutional authority, for which the best of motives is not a substitute.* While the present controversy relates to a delegation to the President, the basic question has a much wider application. If the Congress can make a grant of legislative authority of the sort attempted by section 9(c), we find that nothing in the Constitution which restricts the Congress to the selection of the President as grantee. The Congress may vest the power in the officer of its choice or in a board or commission such as it may select or create for the purpose." (Emphasis added.)

The foregoing quoted portion of the decision sounds almost as though the Honorable Chief Justice might have had the instant case before him because in the case here before the Court the attempt was made by Congress to vest unrestrained and unfettered legislative powers in a

board consisting of five men but which board, was following the adoption of the First War Powers Act, abolished, and its functions vested in one man, as a Commissioner, the appellant Fahey. In further commenting upon the same point it was stated at page 421:

"The Constitution provides that

> 'All legislative powers herein granted shall be vested in a Congress of the United States which shall consist of a Senate and House of Representatives.' Article I, Section 1.

and the Congress is empowered

> 'to make all laws which shall be necessary and proper for carrying into execution its general powers.' Article I, Section 8.

"The Congress manifestly is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested. Undoubtedly legislation must be adapted to complex conditions involving a host of details with which the national legislature cannot deal directly. The Constitution has never been regarded as denying to Congress the necessary resources of flexibility and practicability, which will enable it to perform its functions in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules *within prescribed limits*, and the determination of the facts to which the policy is declared by the legislation to apply. Without capacity to give authorization of this sort we would have the anomoly of a legislative power which in many circumstances calling for its exertion would be a futility. But the constant recognition of the necessity and validity of such provisions, and the wide range of the administrative authority which has been developed by means of them,

> cannot be allowed to obscure the limitations of the authority to delegate, if our constitutional system is to be maintained." (Emphasis added.)

Thus, it can readily be seen from the foregoing case that it matters not what regulations may be, in fact, adopted by an administrative body or commissioner, nor what the motive may be in the administration thereof, that all are outside the pale of the administrative or executive authority unless the Act of Congress under which the duties are purportedly performed and the regulations purportedly adopted, in its own structure and terms, prescribed the limit in which the operations must be confined.

A highly pertinent question was asked in the course of the hearing before the three-judge court and the answer given by the Assistant United States Attorney is indicative of the fallacy in the Act itself. In the course of the continued hearing on July 16, 1946, the question was asked by the Honorable Peirson M. Hall, District Judge:

> "I am referring to the Act here under consideration in this case. Is there anything in this Act which says they shall appoint a conservator in interests of the stockholders?"

To which, the Assistant United States Attorney answered:

> "We will have to look at Section 5(d) again. I cannot stretch it any farther than it goes." [R. 668-669.]

Probably the most pertinent case bearing upon the instant question is that of:

> *A. L. A. Schechter Poultry Co. v. United States*
> 296 U. S. 495.

As that case was a landmark in the field of industrial relations so also will the case now before the Court be a landmark in the field of Savings and Loan Institutions and home financing throughout the breadth of the country. That case is most illuminating by reason of the fact that in passing upon the constitutionality of the National Industrial Recovery Act and in finding it to be unconstitutional the court, again speaking through the Chief Justice, Mr. Justice Hughes, compared the provisions of that Act with those of other Acts which had been held to be constitutional in delegating legislative powers, but in so doing had established adequate guides, criteria and safeguards in the Acts, whereby the actions of administrative and executive agencies were controlled. In digesting the portion of the act under consideration the Court stated at pages 523-524:

> "As a condition of his approval, the President may Impose such conditions (including requirements for the making of reports and the keeping of accounts for the protection of consumers, competitors, employees and others, and in furtherance of the public interest, and may provide such exceptions to and exemptions from the provisions of such code as the President in his discretion deems necessary to effectuate the policy herein declared.'
>
> "Where such code has not been approved, the President may prescribe one, either on his own motion or complaint."

and further on page 525:

> "The President approved the code by an executive order in which he found that the application for his approval had been duly made in accordance with the

provisions of Title I of the National Industrial Act, that there had been due notice and hearings," etc.

In comparing the National Industrial Recovery Act with the Federal Trade Commission Act the Court, at page 533 pointed out that in the Federal Trade Commission Act:

> "Congress set up a special procedure, a commission, a quasi-judicial body was created. Provision was made for formal complaint for notice and hearing, for appropriate findings of fact supported by adequate evidence and for judicial review to give assurance that the action of the commission is taken within its statutory authority."

but the National Industrial Recovery Act had no such safeguards. Neither does the portion of the Home Owners' Loan Act here under consideration for as the court said:

> "For a statement of the authorized objective and content of the 'codes of fair competition' we are referred repeatedly to the 'declaration of policy' in Section 1 of Title 1 of the Recovery Act."

after which the court then went on to hold the same to be insufficient albeit they are broader than the provisions of Section 1(a) of the Home Owners' Loan Act. As to the legality of such delegation of powers the court stated at page 537:

> "The answer is obvious. Such a delegation of legislative power is unknown to our law and is utterly inconsistent with the constitutional prerogatives and duties of Congress."

The language used in commenting on the vast and sweeping powers conferred upon the President to make and approve "Codes" might very well have been directed to the power to make and amend regulations conferred upon the Federal Home Loan Bank Board and its successor, the Federal Home Loan Bank Commissioner (the appellant Fahey), where the court said at page 539:

> "Such a sweeping delegation of legislative power finds no support in the decisions on which the government especially relys."

In comparing the National Industrial Recovery Act with the Radio Act of 1937 the court pointed out that a provision in the latter act for hearing to establish the requirements of public, commercial interests or necessity and a judicial review thereof; and in comparing the same with the provisions of the Tariff Act of 1922, pointed out that the Congress had set up as a standard for tariffs, to be determined by an administrative body, a basis for actual computation as the difference between the cost of production and transportation of foreign made goods and the cost of producing and selling comparable goods in the United States, and provided for a judicial review of such findings, citing the case of:

Hampton v. United States, 276 U. S. 394.

The reference to the *Schechter* case is concluded with the following quotation from that case, and it is respectfully submitted that if the word "regulations" were substituted for the word "codes" and the reference to the

"few restrictions" were deleted that the language applies absolutely in the instant case. Page 541:

> "To summarize and conclude on this point: Section 3 of the Recovery Act (Section 5(d) of the Home Owners' Loan Act) is without precedent. It supplies no standards for any trade industry or activity. It does not undertake to prescribe rules of conduct to be applied to particular states of fact determined by appropriate administrative procedure. Instead of prescribing rules of conduct, it authorizes the making of codes (regulations) to prescribe them. For that legislative procedure, Section 3 (Section 5(d)) sets up no standards aside from the general statement of the aims of rehabilitation, correction and expansion described in Section 1 (Section 5(a)). In view of the scope of that broad declaration, and of the nature of the few restrictions that are imposed, the discretion of the President (Board or Commissioner) in approving the prescribing codes (regulations), and thus enacting laws for the government of trade or industry throughout the country is virtually unfettered, we think the code (regulation) making authority thus conferred is an unconstitutional delegation of legislative power." (Interpolations added.)

It is also worth noting, in passing, that both the National Industrial Recovery Act, held to be unconstitutional in the *Panama Refining* case and the *Schechter* case, were passed at the same session of Congress as was the Home Owners' Loan Act of 1933, and at a time when the country was suffering from an intolerable depression and when remedial legislation was being enacted in volume and at breakneck speed without too much attention being paid to detail or the necessary safeguards.

In the opinion rendered in court below the learned Senior Judge, the Honorable William E. Orr, Circuit Judge, speaking for the court, referred to the two cases above cited and digested and in that opinion states:

"It is agreed that functions of the legislature may not be delegated by the Congress to any executive or executive department, hence, there is posed a single question for determination, to wit: Has the Congress made such a delegation in the sections of the Act under consideration? Fortunately the course to be followed in determining questions of this character has been well chartered by the Supreme Court of the United States. We have but to endeavor to make the proper application of the principles of said Court enunciated to the conditions existing in the matter before us. We refer, particularly to *Panama Refining Co. v. Ryan*, 293 U. S. 388, and *Schechter v. U. S.*, 295 U. S. 495. We look to the statute to see whether the Congress has declared a policy with respect to the providing of rules and regulations for the reorganization, consolidation, merger or liquidation of federal savings and loan associations, including the power to appoint a conservator or receiver to take charge of the affairs of any such association and to require an equitable readjustment of the capital stock of the same; and to release any such association from such control and permit its further operation; whether the Congress has set up as standard for the President's (board's) action; whether the Congress has required any finding by the President (board) in the exercise of the authority to do the things enumerated in section 5(d) of the Act (*Panama Refining Co. v. Ryan, supra*, p. 415.) It may be said of section

5(d), as was said in the section involved in the Panama Case; it is 'brief and unambiguous.' It makes no attempt to lay down rules for the guidance of the board nor does it state in what circumstances or what conditions the board is to merge institutions or appoint a conservator or receiver. It establishes no criterion to govern the board's course. It does not require any finding by the board as a condition of its action. No policy is declared by Congress as to merger, or appointment of conservator. The section gives to the board unlimited authority to formulate rules for the board's action in the respects mentioned and to do so as it may see fit. The only restrictions on those powers were to be such as the board might choose to put upon itself in the rules and regulations which it, the board, adopted to govern itself. We are unable to find in the Act a declaration of policy or standard which can be deemed to relate to the subject of section 5(d)." [R. 376-377.] (68 F. Supp. 418-420.)

From all of the foregoing cited and digested cases it is graphically apparent that Section 5(d) of the Home Owners' Loan Act is unconstitutional by reason of the fact that it does not provide for the due process of law provided for and anticipated by the Fifth and Fourteenth Amendments of the Constitution of the United States, and is therefore, contrary to those amendments to the Constitution; and that since no safeguards, standard, criteria or curbs of any kind or nature are established in the statute in the granting of unlimited and

unfettered power to the Federal Home Loan Bank Board to adopt regulations, that it is further unconstitutional being violative of Article I. Section 1, and Article I, Section 8, Clause 18 of the Constitution. Therefore, since the power sought to be delegated by the Congress to the Federal Home Loan Bank Board, by said section, was beyond the scope of its power, any purported regulations enacted or adopted thereunder are entirely void and it follows as a necessary consequence that the act of appointing a purported conservator pursuant to the claimed power in a void regulation makes such appointment an idle act and entirely without legal foundation. Hence, the conservator must be considered only as a trespasser and any acts done by him are of no effect and void *ab initio.*

The foregoing arguments also effectively dispose of the contention made in the court below by the appellants, Fahey and Ammann, that the trial court was without jurisdiction to entertain any proceedings or hear the matter unless and until the appellees, and all of them, should have submitted to the "administrative hearing" proposed by the appellant Fahey in the regulations, to pass upon the validity and propriety of his own acts.

As herein demonstrated, unless the hearings be provided in the statute itself, unless they be before a disinterested, fair and impartial tribunal, and unless they be made subject to judicial review, all by statutory enactment, they are of no effect.

VIII.

Position of Title Service Company How Affected by Judgment.

The borrowers from the Association have, by their execution of deeds of trust naming this appellee, Title Service Company, as trustee, reposed in said trustee the confidence and trust of such borrowers for the protection of the titles to the real property which such borrowers have hypothecated as security for the payment of their loan to the Long Beach Federal Savings and Loan Association. [R. 402, par. 3.] Therefore, it is incumbent upon this appellee to protect the titles to said real property from further clouding by the acts of the appellant Ammann, and from the consequences of the acts of his superior, the appellant Fahey. At the time all of the loans were made, prior to May 20, 1946, the date of the seizure of the assets of the Association by the appellants Fahey and Ammann, all of the loans were payable at the office of the Association in the City of Long Beach, State of California, at which place the borrowers could, if they wished, see their original documents and insist upon the endorsement of their payments upon their loans on the original notes. That on or about the 29th day of March, 1946, the appellants Fahey and Ammann, arbitrarily and without notice and purporting to act under the power conferred by Section 5(d) of the Home Owners' Loan Act, seized possession and control of the Federal Home Loan Bank of Los Angeles, merged the same with the Federal Home Loan Bank of Portland, and dissolved the Federal Home Loan Bank of Portland, as merged with the Federal Home Loan Bank of Los Angeles, with the Federal Home Loan Bank of San Francisco which had not theretofore existed but which was created on that

day. All of these acts were contemporaneous. [R. 7 and 8.] All of the foregoing was accomplished by the issuance of Federal Home Loan Bank Administration Order Nos. 5082, 5083 and 5084. [R. 293-295.] That contrary to any knowledge that any of such borrowers might have had at the time of the execution of their respective deeds of trust, and in their dealings with the Association, promissory notes and deeds of trust aggregating the approximate amount of $7,000,000.00 have been deposited with the purported Federal Home Loan Bank of San Francisco by the appellant Ammann. [R. 396.] Such deposits were made as collateral for loans made by the purported Federal Home Loan Bank of San Francisco to said appellant. As to whether or not said documents are still on deposit, as such collateral, with said Federal Home Loan Bank of San Francisco, or whether the same are on deposit at its Los Angeles Branch, its Portland Branch, or in San Francisco, cannot be known to such borrowers. It may very well be that such securities have been re-hypothecated by said Federal Home Loan Bank of San Francisco with some other financial institution within or without the jurisdiction of the Federal District Court of California. As a consequence of these facts it has been and is highly essential that this appellee, Title Service Company, use its utmost efforts on behalf of such borrowers to insure that their property rights are not violated, and that they be not placed in double jeopardy in the making of the payments on their loans.

Even had the purported appointment of the appellant Ammann as the alleged conservator for said Association been a valid appointment, his acts in such capacity have been such as to disqualify him from continuing in such

position. One example of his maladministration of his office is the attempted cancellation of a promissory note and deed of trust executed by one M. C. Stanford and Frances J. Stanford by mutilating said documents by tearing therefrom the signatures of such persons, notwithstanding the fact that said deed of trust had theretofore been recorded in the office of the County Recorder of Los Angeles County, California, and become a lien on the property of said persons. [R. 400; 401-408.]

IX.

The Court Properly Made a Final Decree and Granted a Preliminary and Permanent Injunction.

The assignments of error, Nos. 12 and 13 of appellants' opening brief, are that the court erred in granting temporary and permanent injunctions without any hearing whatsoever upon their issuance and without any hearing or trial upon the facts. It is respectfully submitted that upon the arrival by the trial court at the conclusion that Section 5(d) of the Home Owners' Loan Act of 1933 was unconstitutional and that, as stated in its opinion:

> "Authority to do the acts sought to be restrained if found to exist, must be bottomed on subsection (d) of 5 of the Federal Home Loan Bank Act, as amended." [R. 374-375.] (68 F. Supp. 418, 419.)

That nothing but useless and expensive delay could result by the issuance of a preliminary injunction only and that the court, not only had jurisdiction to, but most properly did, issue a permanent injunction giving the relief ultimately prayed for in the complaint and in the cross-claim of this appellee, to wit: (1) the restoration

of the assets and management of the Association to its officers and directors, and (2) the determination that the appellants had no right, title or interest in or to any of the interplead property. To have done otherwise would have worked continued irreparable injury and damages to the multitudinous borrowers, the titles to whose real property is clouded as a result of the act of the appellants Fahey and Ammann.

One case definitely bearing upon this question, although referring specifically to patent and trademark law, and which most aptly expressed the reasons for the issuance of a permanent injunction upon the hearing of the motion for a preliminary injunction is:

Coca-Cola Co. v. Los Angeles Brewing Co., 1 F. R. D. 67,

wherein the Honorable Paul McCormick, the trial judge, stated:

> "There is, however, a fixed principle in patent law and I dare say it is applicable to trademark litigation as well. It has been applied in many cases by this court. It operates where there isn't anything to be gained by prolonging litigation *except to afford to one or the other of the litigants a respite and moratorium to suspend the enforcement of rights;* but that is no safe criterion in determining the course the court should follow on an application for a preliminary injunction. It usually applies in patent litigation where there has been a prior adjudication validating a patent and the only question at issue is one of infringement. There the situation can be arrived at generally, except in so far as the question of infringement is concerned, just as securely and much more satisfactorily on the preliminary application

as it can by a trial after a long hearing, expensive both as to time and to money.

What is there that can be modified or changed or that needs any further exploration? What factual situation is there that could be any more definitely presented to the court in January than today? I think there is nothing. There may be many more affidavits filed on each side of the question. There may be a great deal of oral testimony developed on both sides of the issue. There may be extensive arguments made as to the effect of these matters but, upon analysis, the same issue will be presented. If that is the case, it should be determined summarily." (Emphasis added.)

The foregoing language is equally adaptable to the issues in the case at bar. In following the inquiries raised by Judge McCormick's opinion, it might here be asked: What bearing could any facts have to do with the validation of an unconstitutional statute? As was stated in the *Schechter* case, *supra*, it matters not what beneficent motives may underly the adoption of a code or regulation, if there is no constitutional foundation for the adoption of such code or regulation, the best of motives cannot cure that defect. Therefore, regardless of how prolonged the litigation might be, regardless of how many witnesses might be heard, the ultimate outcome could only be the same, *i. e.*, that the appellant Fahey was without power to appoint a conservator, and that the appellant Ammann, as such purported conservator, is only a trespasser and without rights of any kind or nature. Insofar as the appellee Title Service Company is concerned, and the borrowers whose trust it represents, such a prolonging of a litigation can only result in fur-

ther untold hardship, damage and irreparable loss. Since many of these borrowers are ex-service personnel who have already lost from two to five years of their own rights to the enjoyment of private life, such prolonging of the litigation could only add to their hardships in precluding them from obtaining the benefits of the so-called "G. I. Bill of Rights." Since the acts of the appellants, both Fahey and Ammann, have deprived them of the ability to obtain clear title to the real property upon which their homes, for which they so valiantly fought are built, and the right to purchase homes, because no clear titles can be obtained which may be used as security for the loans to be guaranteed for them under the "G. I." Bill.

The right of a Federal Court, sitting in equity, once having assumed jurisdiction to give a complete remedy and to issue a permanent injunction upon the hearing upon the motion for a preliminary injunction is not a point *de novo*. It has been decided by this court in the case of:

Sterling v. Constantin, 287 U. S. 378,

wherein this court in the person of Chief Justice Hughes, in affirming the order of a three-judge statutory court in granting an interlocutory and permanent injunction, even as was done by the court below in this proceeding, restrained the governor and certain military officials of the State of Texas from enforcing military orders restricting the production of plaintiffs' oil wells, stated at page 393 as follows:

> "The jurisdiction of the district court so constituted and of this court upon appeal, extends to every question involved, whether of state or federal law,

and enables the court to rest its judgment on the decision on such of the questions as in its opinion effectively dispose of the case."

The attention of the court is respectfully directed to the fact that issues of fact have not been raised by the pleadings and that the sole question before the court is one of law, to wit: the constitutionality of that section of the Home Owners' Loan Act under which the appellants have assumed to act.

Another case wherein an interlocutory and final judgment was entered by the trial court upon an application for the preliminary or interlocutory injunctions was that of:

Allegheny Oil Co. v. Snyder, et al., 106 Fed. 764. (Certiorari denied in 181 U. S. 618.)

That case was one wherein a preliminary injunction was sought to stay the rights of the lessee under an oil lease executed subsequent to the lease held by the complaining party. At the hearing, and in previous hearings in the state court, the first lease was held to have been valid and therefore the attempted second lease had necessarily failed. In its opinion the Court stated:

"In such cases in courts of the United States may proceed to administer final relief without putting the parties to the expense and delay of protracted litigation. Mast, Foos & Co. v. Stover Mfg. Co., 177 U. S. 485, 20 S. C. 708, 44 L. Ed. 856, citing with approval, Cardt v. Brown, 113 Ill. 475; Green v. Mills, 16 C. C. A. 516, 69 F. 852, 25 U. S. App. 383; and the decision of this court in Mayor etc. of Knoxville v. Africa, 23 C. C. A. 252, 77 F. 501, 47 U. S. App. 74. Finding no error in the decrees entered in the court below, the same will be affirmed."

X.

The Provisions of the Home Owners' Loan Act Are Separable.

The case now before the Court is not the first proceeding in which a section of the Home Owners' Loan Act of 1933, as amended, has been attacked for unconstitutionality. That the provisions of the Act are separable and that no great harm would come to the Act as a whole by the holding that Section 5(d) is invalid is definitely demonstrated by the case of:

Hopkins Savings Association v. Cleary, 296 U. S. 315.

In the *Hopkins* case Section 5 (i) of the same Act was held to be unconstitutional. That sub-section was one which attempted to allow savings and loan associations which had been organized under the laws of a state to convert to Federal Savings Loan Association upon the vote of a sufficient number of its members, but without the consent of the state under the statutes of which it had been created. In holding this sub-section to be unconstitutional this Court held such provision to be an invasion of the rights reserved to the states.

Even though it may be here contended, as it was in the court below, that the invalidating of sub-section 5(d) would result in the crippling of the Federal Home Loan Bank Administration by depriving it of its supervisory powers; it is submitted that the doors of all of the federal courts are still open to such administrative body and that in case facts should be developed by an examination of any Federal Savings and Loan Association which would warrant the appointment of a receiver or a conservator

that such might be done upon a proper application to any such court. Of course, this would require the application to the courts which has been so assiduously avoided in the instant proceeding and would require that an actual showing of facts would have to be presented to establish the right to have a federal court intercede and a bald statement of conclusion would not be sufficient. Such a statement as was used in this case, Federal Home Loan Bank Administration Order No. 5254 [R. 300] transmitted by telephone as set forth in the affidavit of the appellant Ammann [R. 296-297], would be entirely insufficient. However, the parties accused would have an opportunity to be heard in a fair and impartial tribunal and the conservator or receiver appointed would be under the jurisdiction and control of the local federal District Court, at or near the seat of the association involved, and not some 3000 miles removed from the directing authority, the appellant Fahey, as in the instant case.

XI.

Reply to Appellants' Opening Brief.

It is rather difficulty to adequately answer the opening brief of the appellants by reason of the fact that the great majority of it is apparently directed to all of the appellees indiscriminately, with the hope that some of it will affect all of them. The only specific portions of the same directed to the appellee, Title Service Company, are the three pages appearing at pages 95-97, inclusive. However, in reading the brief there appear to be so many broad statements that might be construed as applying to this appellee that it is deemed necessary to comment on many of them. Therefore, this rebuttal will be directed largely to the

points in the order in which they are raised in the opening brief.

In the general statement it is noted on page 5 that the original charter of the Association is referred to in a quotation made, and from which it is stated that, in that charter, it was provided that the Association should at all times be subject to the provisions of the Home Owners' Loan Act of 1933, and, "to any amendments thereof, and to valid rules and regulations made thereunder." The key word in this statement is the word *"valid."* Undoubtedly, if Section 5(d) of the Home Owners Loan Act had made adequate provision for the adoption of rules and regulations and had prescribed the necessary criteria, notice and review, there could have been no objection to them.

A significant omission appears in the statement on page 9 with reference to the filing of its cross-claim by the Title Service Company. The only reference there made is to the deposit in the Registry of the Court of 174 deeds of trust and requests for reconveyance, executed by the appellant Ammann. No mention is made of the portion of the cross-claim which was a bill in the nature of interpleader which brought before the Court the approximate 8000 other deeds of trust wherein this appellee was named as the trustee, which deeds of trust secured a large number of promissory notes with a total approximate balance due of $12,000,000.00, or almost one-half of the assets of the Association. [R. 36-37.]

It is true that this appellee filed a motion for a temporary restraining order and for a preliminary injunction to restrain the holding of an administrative hearing

by the appellants Fahey and Ammann. This has been treated in more detail in the opening of this brief (*supra*, p. 33).

Any reference to the summary of the argument will be omitted by reason of the fact that the same matter is covered in the argument itself.

A.

Appellants' Point I(A).

In the argument it is stated, page 27, that the appellees have cluttered the case and record with a conglomerate of unproven and untried charges. The attention of the Court is invited to the fact that at no place in the record are any of these allegedly unproved and untried charges denied. Under Point I it is sought to be shown under Subdivision A, that the appellees should have exhausted their administrative remedy prior to the appealing to the Federal District Court for relief. As herein above set forth, the "administrative hearing" provided for in the regulations of the Federal Home Loan Bank administration is entirely a creature of the administration itself, since it is not provided for in the statute, or in any portion of the Act, nor can the foundation for the same be found in any derivation of terms. Although the time within which this brief must be prepared and submitted is insufficient to allow a detailed reading and analysis of the cases cited by the appellants, those cases which have been read appear to be entirely aside from the point which they are cited to support and that they have been cited for the sole purpose of plucking isolated bits of language therefrom which it is believed may apply to the instant problems. A careful reading of these cases definitely

shows that either the case itself is entirely aside from the issues here presented or if the issues are similar that they show a differentiation which the appellants have failed to make. The whole point of this portion of the argument seems to be that it is necessary to exhaust the administrative remedy purportedly set up by the regulations, even though there is no constitutional or statutory foundation for the adoption of such regulation, and that the same is a figment and creature of the administration adopted in the forlorn hope that their lack of statutory or constitutional foundation may elude the scrutiny of a court before which they may be challenged. The cases cited in support of this theorem are not in point as is indicated from the following brief résumé thereof. The first of these is the case of:

Myers v. Bethlehem Steel Corp., 303 U. S. 41.

This was an action attacking the provisions of the National Labor Relations Act wherein the Court held that it was necessary that the appellants submit to an administrative hearing prior to resort to the courts. However a reading of the case definitely establishes that the Act there in question, in itself, provided for such hearing and for a judicial review thereof. As was stated at page 49:

> "The Act establishes statutes to which the Board (NLRB) must conform. There must be a complaint, notice and hearing. The Board must receive evidence and make findings. The findings as to the facts are to be conclusive but only if supported by evidence. The order of the Board is subject to review by the Court (Circuit Court of Appeals) and only when sustained by the Court may the order be enforced." (Interpolations added.)

Thus, it is seen from the foregoing quotation how far afield is the cited case from the case at bar since the hearing provided for in the cited case was required by the Act itself, which also provided for a judicial review.

The next case cited is that of:

Macauley v. Watermay Steamship Corp., 327 U. S. 540.

This was a case under the Renegotiation Act. That Act required a hearing before the Chairman of the Maritime Commission and provided for a review by the Tax Court. The Act there under consideration definitely set up the standards to be followed and provided for a judicial review. It is interesting to note from the report that this case was argued by one of the counsel for appellants herein, *i. e.*, Robert L. Stern, Esquire, who certainly should have noted the distinctions between the acts under consideration.

The next case referred to is that of:

Goldsmith v. U. S. Board of Tax Appeals, 270 U. S. 117.

This was an action in mandamus to compel the admission to practice of the applicant before the Board of Tax Appeals. The petitioner filed his application with the Board and opposition was filed thereto but before the matters could be heard the mandamus proceeding was commenced. It is true that in that case the last Chief Justice Taft did state that it was necessary that the petitioner exhaust his administrative remedy, to wit: the hearing by the

board with which his application had been filed and that therefore, the mandamus proceeding was premature. However, as the appellants have failed to point out, a denial of the application would have been subject to review in an appeal therefrom.

Another case cited by the appellants is the very late case of:

United States v. Ruzicke, No. 54, this term, reported in 327 U. S. 776,

the opinion having been written by Mr. Justice Frankfurter. This case was one wherein an attack was made on the constitutionality of the Agricultural Marketing Agreement Act. The attack was made in a judicial proceeding which was commenced prior to the submission of the matters to an administrative hearing. Here again, as in all of the cited cases, the Act itself provided for a hearing and a review by the Federal District Court.

The other very late case relied upon by the appellants is that of:

American Power and Light Company v. Securities and Exchange Commission and Companion Cases, this term, Nos. 4 and 5, reported in 325 U. S. 846 and 91 L. Ed. Adv., page 89.

This case is cited in support of the contention (appellants' brief p. 31) that it is not material that the administrative hearing is provided by regulation rather than by statute. An examination of the statute there under consideration discloses that the provision for hearing and

notice thereof is in the Act itself. (*North American Co. v. Securities and Exchange Comm.*, 90 L. Ed. Adv. 737 at 742, n. 7), and the Court concludes, page 100 (L. Ed. Adv.) "that the Commission is bound under the statute to give notice and an opportunity for hearing to consumers, investors and other persons whenever constitutionally necessary," citing cases. It is further noted that, "the Commission in this instance actually gave all security holders of American and Electric public notice of the pendency of the Section 11 (b) (2) proceedings and invited them to file applications for intervention before a stated time." This, the Court said, was done pursuant to the requirements of the Act (p. 100) and, because of this, court Court further stated (p. 100), "These security holders thus received everything the Constitution could possibly guarantee them in this respect." From the above it is clear that the Court had in mind the necessity for protecting the security holder's rights but found in the Securities and Exchange Act a number of safeguards which are absent here.

From all of the foregoing, it is seen that in all circumstances wherein a compliance with a regulation providing for a hearing before a quasi-judicial body is considered a condition precedent to a judicial appeal that the regulations providing for such hearing have been set up in the Acts themselves which have provided for due and adequate notices and have insured the impartiality of such hearings by a review by a regularly constituted Court. Let

this be contrasted with the instant case, wherein the appellant Fahey would have held such a hearing before one of his own agents and would have himself passed upon the fairness of his actions in appointing a conservator without any provision for review by any judicial body. [R. 96.] (Federal Home Loan Bank Administration Order No. 5309). This order is almost as much a violation of constitutional rights as was the appellant Fahey's "Bulletin 54" issued March 25, 1946 [R. 361-363], wherein he forbade any of his subordinates to produce any records, for any court whether in response to a subpoena duces tecum or otherwise, *supra*.

Not only was the submission to such a mockery of a hearing not required as a condition precedent for an application for judicial relief but such hearing itself would have been an attempted usurpation of the judicial powers of the Federal Court in that the appellant Fahey and his subordinates would have been attempting to determine the same facts as had already been submitted to the Federal District Court some several days before the issuance of his order. That fact was and is the right of any administrative officer to determine the factual correctness and legality of his own acts. Insofar as this appellee is concerned such a hearing could only have further beclouded the titles to the real property which it held in trust for the more than eight thousand (8000) borrowers from the Association.

B.

APPELLANTS' POINT I(B).

Point I(B), that of estoppel, can in no wise be deemed to apply to this appellee although it is not conceded that the doctrine applies to any of them. Even though a majority directorate of the Title Service Company may have been the same as that of the Association, Title Service Company is a corporate entity established under the law of the State of California and is as much separate and apart from the Association as would have been any other trustee, whether individual or corporate. The appellant Fahey most certainly should have been familiar with the fact that the omnipotent power with which he has deemed himself to be clothed by virtue of Section 5 of the Home Owners' Loan Act is restricted in an attack upon a corporation organized under the law of a sovereign State, as the decision in the case of *Hopkins Federal Savings and Loan Association v. Cleary*, 296 U. S. 315, so aptly demonstrates, in holding Section 5(i) of the Home Owners' Loan Act to be unconstitutional as an invasion of State's rights.

If, for the purpose of argument, the trustee had been an entire stranger to the association, could it be said that he should have stood idly by and honored the requests for reconveyances presented to him by a party who was not named in the deeds of trust and by whom no notice of any kind of his authority had been served upon the trustee? This is even more remarkably so when such claimant of such right has not been appointed by any judicial body, or elected by the members of the Association.

C.

APPELLANTS' POINT I(C).

The next point raised, Subdivision I(C) is that the District Court lacked jurisdiction over the appellant Fahey. In support of that claim it is sought to show that the act is not a local one to come within the provisions of Section 57, Judicial Code, 28 U. S. C. 118 and as stated on page 48 of the appellants brief:

> "Obviously the section is confined to suits and are local in the sense of relating directly to specific property, real or personal, within the district of suit, or partly therein and partly in another district of the same state."

Can it be said, under any stretch of the imagination, that the titles to 8000 parcels of real property bearing encumbrances of an aggregate value in excess of $1,000,000.00, located exclusively in and near Los Angeles County, California, is not local?

It is further stated at page 50:

> "There has, therefore, been no change in title, ownership, or possession of property. There has been no more than a change in the trusteeship, in management; in brief, only a change of personnel for those acting for the association."

Can it be said that it matters not to the investors in the association or to the borrowers from the Association (R. 164-165), all of whom are members of the association, that the forcible removal of their own elected representatives and their replacement with absolute strangers has no effect? One might as well suggest that the forcible ouster of the elected Congress would have no effect on the people of the United States.

Even if this Court should hold that the jurisdiction of the District Court was not absolute under the provisions of Section 57 of the Judicial Code, the filing of its equitable defense in interpleader and the bill in the nature of interpleader by this appellee, Title Service Company, and the bill in the nature of interpleader by the appellee Wallis, under the provisions of the Federal Interpleader Act, Judicial Code, Section 24 (26), 28 U. S. C. 41 (26), confers absolute and unconditional jurisdiction on the trial court which requires the adjudication of the same question raised in the principal action. A feeble attempt has been made to show that this appellee could not have taken advantage of that Section and, as stated above, the argument is apparently deliberately restricted to the deposit of 174 promissory notes and deeds of trust in the Registry of the Trial Court with a total disregard and failure to mention the other deeds of trust, approximately 8000 in number, which were brought before the court by the bill in nature of interpleader by this appellee. As set forth in the paramount case in the field of interpleader as an equitable defense of:

Railway Express Company v. Jones (supra),

all of the necessary elements to an interpleader are here present including diversity of citizenship as between the association a resident of California, and the appellants Fahey and Ammann, residents of Massachusetts and Maryland respectively; property of a value in excess of $500.00, *i. e.*, $12,0000,000.00; and divergent and conflicting claims to the possession, management and control of that property. Therefore, whether or not any jurisdiction whatsoever attaches under the complaint herein, jurisdiction in interpleader, in and of itself, is sufficient to require

determination of the respective rights, which determination was made in the trial court.

As to the indispensability of the appellant Fahey, it is believed that the same has heretofore been adequately covered above in the citation and digesting of the cases of:

Colorado v. Toll, 268 U. S. 228;

Jarvis (Postmaster) v. Schachelton Inhaler Co., 136 F. (2d) 116 and other cases there cited.

D.

APPELLANTS' POINT II.

The next major point (II) is the claim that Section 5(d) of the Home Owners' Loan Act is constitutional. It is believed that this point has been quite thoroughly covered above but it is most interesting, in passing, to note the extremes to which the appellants have gone in attempting to read into the act sufficient statements by which the necessary constitutional safeguards or criteria might be read into the act. The meaning and connotation of the words "conservator" and "receiver" have been carried to their extreme. In fact, the two words are synonymous as applied in current legislation and almost universally connote a judicial background for the appointment of such a person and thereby include a constitutional basis for the appointment and judicial supervision of the acts of such officer. There is one statement made by the appellants, page 67 of their brief, wherein this appellee most heartily concurs wherein they state:

> "If Section 5(d) had merely authorized the bank administration to apply to a court of competent jurisdiction for the appointment of a receiver or conservator, we have no doubt that neither appellees nor the

District Court would have seen any constitutional objection. No claim of unlawful delegation of legislative power would have been made."

On pages 69 to 71, inclusive, the appellants list 8 grounds for the taking over of an institution. The grounds listed (a) through (h), inclusive, excepting (d), have no application in this case. They are insolvency, impairment of capital, violation of charter, suspension of payments, neglect to comply with an order of a supervisory official, refusal to submit to examination, and refusal of an officer of the institution to be examined under oath regarding its affairs. The only one which has been sought to be applied in the instant case is (d) which contains a list of conclusions of law almost identical with those contained in Federal Home Loan Bank Administration Order No. 5254 under which the appellant Ammann asserted the right to seize the Long Beach Federal Savings and Loan Association. [R. 300-301.] Such order was made with no notice, hearing, or charges being preferred, even as were Federal Home Loan Bank Administration, Orders Nos. 5082, 5083 and 5084 [R. 293-295, incl.] under which the Federal Home Loan Bank of Los Angeles was liquidated, merged with the Federal Home Loan Bank of Portland and the combined bank transferred to the newly established Federal Home Loan Bank of San Francisco and the 12th Federal Home Loan Bank District abolished and consolidated with the 11th Federal Home Loan Bank District. It is not possible for this appellee to see how the other subsections of Section 5 of the Home Owners Loan Act can give any indices or criteria under which the Federal Home Loan Bank Board might have properly acted in establishing their rules and regulations, provided for in Section (d).

E.

Appellants' Point IV.

Section IV of the appellants' brief is the only one which apparently specifically deals with this appellee. As noted above it is entirely immaterial whether or not the officers or directors of the Title Service Company may have been parallel with those of the Long Beach Federal Savings and Loan Association. Title Service Company ,a separate entity and a corporation established under the State laws of the State of California has no interest in, nor is it subject to any of the purported rules or regulations of the Federal Home Loan Bank Administration, nor to any of the provisions of the Home Owners' Loan Act. It is to be noted that appellants have assidously refrained from mentioning the bill in the nature of ,interpleader filed by this appellee which had as its subject matter the approximately 8000 deeds of trust wherein legal title to as many parcels of real property was vested in Title Service Company as trustee. An obviously false and misleading statement appears on page 96 of the appellants' brief wherein it is stated:

> "The only basis claimed for interpleader, is Title Service Company was in doubt whether it should reconvey the property at the request of the conservator, the legality of whose status was not clear. This asserted difficulty was easily obviated in the court below, by duplicate instructions to Title Service Company from the conservator and the former management."

The fact is that the Home Investment Company of Long Beach necessarily had to present a proceeding in intervention to accomplish this end. Although the reference made to the documents on file in the court below indicate that one

set of requests for reconveyance was made by the association without having been ordered so to do, that a reference to the transcript of testimony discloses quite the opposite. In the course of the hearing the Court stated [R. 589]:

> "At my suggestion the request for reconveyance of the Association has been prepared."

And again [R. 592]:

> "Mr. Walker: I suppose, Your Honor, that the statement I wish to make is in the nature of an objection, and I should perhaps preface it by saying that I personally feel that the petitioner in intervention here is entitled to relief. The objections are two-fold: In the first place—
>
> The Court: Instead of calling them objections, why not call them expression of your reason for lack of consent?
>
> Mr. Walker: Will the reporter include that at the beginning of my remarks then.
>
> We have interposed objections by way of motion to dismiss to the interpleader suit itself. One reason for my inability to consent is that it might be putting my client in the position of recogniz[illegible] the validity and submitting to the jurisdiction of the Court. That I cannot do."

And again when the Court spoke [R. 596]:

> "There should also be a reservation in the order that by the order no adjudication is made or attempted to be made of any of the issues raised by the complaints in intervention or the motions of the appearing defendants, nor are they to be prejudiced by the issuances of such order. Otherwise I do not think I would have any objection to such other form of order as the parties may agree upon."

The lack of voluntary deposit of such requests is further indicated by the order made in the nature of the intervention of O'Rourke [R. 513]:

> "* * * That the Long Beach Federal Savings and Loan Association shall deliver to the Clerk of Registry of this Court its request for reconveyance; * * *."

Thus it is seen that there were, in fact, no voluntary deposits of duplicate requests for reconveyance. All of the requests made by the Association, were made by reason of the persuasion or order of the Trial Court and the counsel for the Association made it abundantly clear to the Court that the Association did not recognize the authority of the appellant Ammann to execute requests for reconveyances, nor to accept payments upon the notes or deeds of trust and that it, the Association, therefore could not voluntarily execute such requests pursuant to the demand of the appellant Ammann, and that the appellant Ammann did object to such proceedings. In truth and in fact Title Service Company, on behalf of its many trustors, and with counsel for the plaintiffs and for the Association, did solicit a stipulation from the appellants which would allow the clearance of the titles to real property by the means suggested by the appellants in their brief, which stipulation was declined by the appellants upon the ground that to do so would be tantamount to recognizing the authority of the District Court which they declined to do. The effect of this lack of cooperation has been to limit the number of persons who were able to clear their titles by the intervention method to those who could afford the expense of private counsel for such interventions and has placed it beyond the reach of all

of those whose modest means did not allow them to incur the expense to clear the titles to property which had been beclouded through no fault of their own. This includes many ex-service personnel who are unable to avail themselves of privileges of the "G. I. Bill of Rights" and who have been deprived of the enjoyment of their own property for which right they expended from two to five years of their life to protect their homes, too late to find that the same had been usurped by an arm of the government which they had fought so well to defend. How true this is can only be known to those who have been so disillusioned, including counsel for this appellee. It is most unfortunate that one in whom the trust of the government has been reposed, the appellant Fahey, has seen fit to so abuse his position as to try to place himself above and beyond the constitutional control of the Courts.

Although the criticism directed at the appellee Wallis on page 98 of the appellants brief, is not, by its terms, directed at this appellee, it might be claimed to apply, in that the interpleader does not exhibit the disinterestedness normally required by an interpleading party. This contention is adequately disposed of by numerous cases holding that such a person, though not totally disinterested, may still avail himself of the interpleader statute.

Hunter v. Federal Life Insurance Company, supra.

By footnotes on the same page it is pointed out that there is no diversity of citizenship between the interpleader and the Association. This contention is adequately disposed of by the interpleader Section itself wherein it is provided and made sufficient if one of the adverse

claimants is a non-resident of the district. It is likewise disposed of in the case of:

Treines v. Sunshine Mining Co., 308 U. S. 66, *supra*.

In view of the fact that both of the appellants are non-residents of California, *i. e.*, Fahey a resident of Massachusetts and Ammann a resident of Maryland, the diversity is sufficient and complete.

It has been urged throughout the appellants' brief and it is included in the prayer thereof that the action be dismissed. Should this Court, for any reason, be of the opinion that a dismissal is warranted, the question must necessarily follow as to what disposition would be made of the interplead property. Since the trustee itself physically deposited documents which were evidence of title and which were securities, and which securities have since been transmuted into cash in the approximate amount of $900,000.00 now held on deposit in the Registry of the Trial Court, to whom would it be returned? The answer appears to be obvious that it would necessarily be returned to the trustee, this appellee. Likewise, the question is asked, what would be the affect of a dismissal on the titles to approximately 8000 home owners? This appellee did not dare to reconvey upon the request of the appellant Ammann and, even should this action be dismissed, it still could not so act. In such cases how could the home owners whose titles are involved clear their titles? Would it mean 8000 separate quiet-title actions? If so, in what court? If the contention of the appellants be followed that the appellants are subject to suit only in the District of Columbia would it be successfully contended that each

of these 8000 individuals would have to take their litigation to the District of Columbia—3000 miles from the situs of their property? Here again the answer appears to be obvious. Their only remedy is by intervention in the pending litigation in the District Court wherein their property is located, their only protection is in the District Court whose jurisdiction must be sustained by this Court, if irreparable loss and great confusion are to be avoided. The only other possible remedy of the Home Owners would be an action in the State Courts which would unquestionably have jurisdiction *in rem* over the titles to the real property. The State Court would then have to determine the same constitutional question now before the Court and take the long road through the District Court of Appeals and Supreme Court of the State of California, and finally back to this Court, a generation or so later with the same question.

Throughout the litigation, and in the pending appeal, the appellants have claimed on numerous occasions that there has been no change in the title, ownership, or possession of the property involved and that they, rather than the original directors and officers, are the operating and managing heads of the Association. If this is the case, this appellee cannot forego asking one further question. The deeds of trust all contain a provision for the substitution of a trustee by the beneficiary. That provision is as follows: "The Trustee named herein, or any successor or successors to any such trustee may, from time to time,

be substituted by the recording, in the County in which the property herein described is located, of a substitution executed and acknowledged by beneficiary hereunder, or beneficiary's successors in interest." [R. 407.] Why, if the ground upon which the appellants rest their authorization is so solid, have they not exercised this right of substitution? If their position is well taken to the effect that the lack of cooperation by this trustee is the only stumbling block in the way of clearing of titles, certainly the substitution of a "disinterested" trustee would long since have solved this difficulty. The answer again must be obvious in that the conflict of the claim of right to manage the affairs of the Association, as the beneficiary under all of these deeds of trust, by the appellant Ammann, with the rightful interest of the officers and directors of the Association, is insufficient to vest a marketable title to any real property reconveyed upon the basis of a request for reconveyance executed by such appellant. Although the appellants claim that the identical management of the Association and this appellee is unfit and too dangerous to run the Association, and that by reason thereof they seized the Association, that same management is apparently satisfactory as trustee, no substitution of trustee having been made.

F.

Effect of Dismissal.

One further question presents itself as a necessary result to a dismissal of this action. That question is what results would follow a merger of the Association with any other Association? Although the appellants have claimed to act with the utmost of good faith and have disclaimed any proposal of merger as feared by the plaintiffs, in view of the summary destruction of the Federal Home Loan Bank of Los Angeles and the merging of its assets with those of the Federal Home Loan Bank of Portland with the simultaneous destruction and merger of both banks with a newly established Federal Home Loan Bank of San Francisco, it is hard to believe that such similar fate would not befall the Long Beach Federal Savings and Loan Association without the interposition of the protecting equitable arm of the Federal judicial systems. Should such merger take place, the obligation of the trustors' and borrower members of the Association, which aggregate almost one-half of the assets of the Association, would be transferred and assigned to an absolutely strange institution within or without the territory adjacent to the area in which their homes are located and it is even conceivable that the same might be transferred without the State of California. In negotiating these loans such borrower members did so upon the confidence which they had in the management of the Association and it might not be too much to anticipate that they might find themselves ultimately indebted to an institution any place within the continental limits of the United States—Hawaii, Alaska or Puerto Rico; that is to say, any place wherein the Federal Home Loan Bank Administration has been authorized to operate. In such case, how then could they clear the titles to their homes?

Conclusion.

In view of the foregoing, it is respectfully submitted:

1. *That* the Trial Court had jurisdiction of the subject matter, and had jurisdiction of the parties;

2. *That* the appellant Fahey is not an indispensable party;

3. *That* the Court had jurisdiction to hear and to determine the matters before it;

4. *That* Section 5(d) of the Home Owners' Loan Act of 1933, as amended, is unconstitutional, being in violation of the 5th and 14th Amendments of the Constitution of the United States and in violation of Article I, Section 1, and Article I, Section 8, clause 18, of the Constitution of the United States;

5. *That* having found said section to be the basis for the adoption of the regulation under which the appellants Fahey and Ammann presumed to act was unconstitutional, it necessarily follows that they are without power and that the court below had no alternative other than to make the judgment which it did; and

6. *That* no good could have followed, but that unwarranted, damaging and irreparably injurious delay and multiple and vexatious litigation could only have followed the limitation of judgment to an interlocutory injunction, and that this Court should affirm the judgment of the Court below in its entirety.

Respectfully submitted.

HARRY O. WALLACE,

Attorney for Appellee, Title Service Company.